Supreme Court, U.S.
FILED

No. 091027 FEB 24 2010

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In The
Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,
Petitioner,

v.

NEW ALBANY DVD, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 24, 2010

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QUESTION PRESENTED

The First Amendment allows a city to regulate the location of sexually oriented businesses based on any evidence "reasonably believed to be relevant" to the city's interest in preventing the negative secondary effects of such businesses. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding 1,000-ft. buffer from churches, schools, and residences); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (reaffirming deferential *Renton* standard). New Albany, Indiana relies upon eighteen land use and crime impact reports, seventeen judicial decisions, eyewitness observations of adverse impacts, and expert testimony in defending its *Renton*-type regulation prohibiting respondent's adult bookstore from operating at its chosen site—adjacent to a residence and across the street from a church. The Seventh Circuit (Easterbrook, C.J.), after observing "the problems of interpretation and application created by the fractured decision in *Alameda Books*," held that the City had not sufficiently supported its regulation. The question presented is:

Does the legal standard applied by the Seventh Circuit—that the City must prove "that the restrictions actually have public benefits great enough to justify" an ordinance targeting secondary effects—contravene this Court's precedents?

PARTIES TO THE PROCEEDING

The parties to this proceeding include the City of New Albany, Indiana ("the City"), a political subdivision of the State of Indiana, and New Albany DVD, LLC ("DVD"), a Florida limited liability company.

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PETITION FOR A WRIT OF CERTIORARI

The City of New Albany respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit (App. 1a-9a) is published at 581 F.3d 556. The decision of the U.S. District Court for the Southern District of Indiana (App. 12a-32a) is published at 362 F. Supp. 2d 1015.

JURISDICTION

The judgment of the court of appeals was entered September 10, 2009. The order denying rehearing and rehearing *en banc* was entered October 26, 2009. On January 14, 2010, the Circuit Justice extended the time to file this petition to and including February 24, 2010. (Application No. 09A664.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

"Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

New Albany Ordinance G-04-10 (App. 48a-73a).

STATEMENT

I. Background Facts and Issues

This case concerns an adult bookstore's First Amendment challenge to New Albany's regulations governing sexually oriented businesses, which prohibit the operation of respondent's adult bookstore at its present location—adjacent to a home and across the street from a church. (App. 17a.)

In late 2003, DVD's representative approached City zoning officials and inquired about placing a sign on the roof of a commercial office building at 601 West Main Street. He indicated that the business would be a tile shop, and that he had an exclusive contract with a Brazilian marble export company. (R. 19, Wood Aff. at 1.) On December 29, DVD's contractor obtained a building permit to remodel the building's interior.

Shortly before a final inspection was scheduled to occur, the City learned that DVD was actually planning to open an adult bookstore. On February 19, 2004, the City cancelled the inspection, as DVD had not applied for a required permit to change the land use from an office to a retail store. (App. 14a.) That night, the City Council passed a temporary moratorium on adult businesses. (*Id.*)

DVD challenged the City's actions under the First, Fifth, and Fourteenth Amendments to the United States Constitution, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. On March 18, 2004 the City passed Ordinance G-04-10 ("Ordinance") (App. 48a-73a) to license and regulate sexually oriented businesses in order to prevent negative secondary effects, "including

crime, blight, litter, and the downgrading of property values," which are documented in, *inter alia*, 18 land use and crime impact reports and 17 reported cases cited in the Ordinance. (App. 49a-51a.) The Ordinance prohibits sexually oriented businesses from operating within 1,000 feet of each other or within 1,000 feet of a house of worship, park, school, or residence. (App. 57a.) It also permits lawful nonconforming adult businesses to operate at their present locations for two years before having to move to a conforming location. (App. 58a.)

On April 15, 2004, DVD amended its complaint to seek declaratory and injunctive relief against the Ordinance. On May 5, 2004, the City amended its zoning code to specify the districts in which adult businesses may locate as a matter of right, subject to the specified setbacks from certain land uses. The residential setback provision was updated to specify that a sexually oriented business is prohibited from operating within 1,000 feet of a residential district or 500 feet from a "dwelling," the zoning code's term for a residence. (Ord. Z-04-20) (App. 74a-86a).

On May 5, 2004, the district court held a preliminary injunction hearing, which was recessed so DVD could apply for the zoning permit that it had not yet sought. DVD applied for the zoning permit, which was denied *solely* due to the recently-enacted location rules. (App. 16a.) Specifically, DVD's application was denied because DVD is within: (1) 175 feet of a church, (2) 115 feet of a residential district, and (3) *adjacent* to a dwelling. (App. 16a-17a.)

In June 2004, DVD again sought injunctive relief, focusing this time on Ordinance G-04-10. (R. 66.) DVD

claimed that there is no substantial government interest in regulating adult bookstores that, like DVD's proposed store, lack peep show booths. (App. 21a.)

The City responded that, under this Court's "reasonably believed to be relevant" standard, *City of Renton*, 475 U.S. at 51-52, the City properly relied on secondary effects evidence dealing with sexually oriented businesses as a class of establishments, including strip clubs, adult theaters, and adult bookstores. (R. 75 at 10-19.) The City also observed that its legislative record identifies harms from adult bookstores that are not linked to the presence of peep show booths. (R. 76) (Exh. C-1, Indianapolis study finding decreased property values, concluding that "even relatively . . . passive uses such as . . . adult bookstores . . . have a serious negative effect on their immediate environs"); (Exh. C-2, Garden Grove study finding crime and public safety risks associated with adult bookstores); (Exh. C-3, Austin report finding that "adult bookstores made homes less attractive to families"); (Exh. C-4, Oklahoma City Survey of Real Estate Appraisers finding that "[r]espondents overwhelmingly (74%) indicated that an adult bookstore would have a negative impact on residential property values").

Additionally, the City pointed to evidence specifically demonstrating secondary effects from so-called "retail-only" adult bookstores, including evidence supporting zoning rules upheld against a similar attack in *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004). (R. 75 at 11-13.) The City also relied upon the opinion of an expert criminologist, Dr. Richard McCleary, who

identified studies, including one he conducted, finding "large, significant secondary effects" for all sexually oriented businesses "irrespective of the 'on-premise' versus 'take-home only' distinction, a distinction that [he] conclude[s] is irrelevant to measuring the public safety risk" posed by such enterprises. (R. 76, Exh. D at 4-5); (R. 89, Exh. C at 37) (noting most of the adult bookstores in the Greensboro study "rented products for off-premise use exclusively" and that the secondary effects reported for bookstores "are attributed, thus, almost entirely to off-premise sexually-oriented businesses").

On November 1, 2004, the City Council passed Resolution R-04-35, expressing reliance on additional evidence of secondary effects associated with "retail" adult bookstores, (App. 88a-90a), and stating that the City's interest in preventing these effects "exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses . . . ." (App. 87a.)

II. Decision of the District Court

On November 9, 2004, the district court conducted a full evidentiary hearing, with expert witnesses testifying for both sides.

Dr. Daniel Linz, a communications professor who admitted that he has no background in criminology, testified for DVD. He opined that *none* of the City's studies are scientifically valid and thus, none prove that adult businesses have adverse effects. He also reviewed calls for service ("CFS") to the police from *non*-adult stores selling small amounts of explicit

material, opining that they do not have adverse effects. (App. 21a-24a.)

Dr. McCleary, who sits on the editorial boards of the four leading criminology journals, testified for the City. Citing well-established criminology theory (routine activities theory), his own empirical work in the field of secondary effects, and his reanalysis of data used by Dr. Linz in prior studies, Dr. McCleary testified that "retail" adult bookstores, like other sexually oriented businesses, are associated with large, crime-related public safety risks. (App. 23a.)

DVD did not present any evidence challenging the City's other secondary effects interests, such as preventing decreased property values.

On January 3, 2005, the district court enjoined Ordinance G-04-10. Applying *City of Renton* and *Alameda Books*, the court identified the City's broad secondary effects rationale and then focused on the crime risk associated with sexually oriented businesses. (App. 20a.) After summarizing the expert witness testimony, the court held that the City satisfies the *Renton* standard and that DVD "neither demonstrates that the City's evidence does not support its rationale nor does it dispute the factual findings of the many studies relied upon by the City." (App. 24a.)

The court nevertheless enjoined the Ordinance, allowing the adult bookstore to open. The court opined that the Ordinance was not narrowly tailored because less-restrictive means—like permitting adult bookstores to locate next to churches, but making them

close during worship services—would adequately serve the City's interest. (App. 25a-27a.)[1]

III. Decision of the Seventh Circuit

Four years after the appellate argument, the Seventh Circuit affirmed the district court on different grounds. (App. 5a-9a.) The panel rejected the district court's narrow-tailoring analysis as contrary to this Court's precedents. (App. 4a-5a) ("When some regulation is justified, a city has considerable discretion on matters of detail. The sort of zoning rule that New Albany enacted has been too widely used, and too often sustained, to be upset as 'not narrowly tailored.'").

Instead, the panel—expressly incorporating and applying its one-week old decision in *Annex Books, Inc. v. City of Indianapolis*, No. 05-1926 (7th Cir. Sept. 3, 2009) (Easterbrook, C.J.)[2]—held that the City had not demonstrated a substantial government interest under the *Renton-Alameda Books* standard. (App. 7a) ("Our opinion in *Annex Books* expands on this reasoning,

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[1] The district court also concluded that DVD was "in substantial compliance" with the City's zoning rules and entitled to operate for two years in its location as a pre-existing, nonconforming use. (App. 29a-31a) The Seventh Circuit observed that since DVD has been open for more than two years, the issue is moot. (App 3a.)

[2] As in this case, nearly four years elapsed between argument and decision in *Annex Books* The *Annex Books* decision was released in typescript two weeks after counsel for Annex Books filed, in this Court, a petition for a writ of mandamus. (No. 09-221.) The Seventh Circuit also denied rehearing and rehearing *en banc* in *Annex Books* (7th Cir. No. 05-1926, R 34, Order dated Oct. 26, 2009)

which need not be repeated here."); (App. 11a) (Judgment) ("The case is REMANDED for proceedings consistent with this opinion and *Annex Books* in accordance with the decision of this court entered on this date.").

Annex Books holds that, under intermediate scrutiny, "to prevail, the City needs *evidence that the restrictions actually have public benefits great enough* to justify any curtailment of speech." (App. 35a) (emphasis added); (App. 39a) (holding that "the public benefits of the restrictions must be established by evidence"). This holding effectively overrules Seventh Circuit precedent, conflicts with other circuits, and contravenes binding authority. *See, e.g., Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721 (7th Cir. 2003) (holding village need not "*prove* the efficacy of its rationale for reducing secondary effects *prior* to implementation") (emphasis in original) (citing *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring in judgment)).

Consistent with this heightened scrutiny, the panel decisions in both *Annex Books* and this case hold that secondary effects evidence concerning sexually oriented businesses in general, or even adult bookstores in particular, is not sufficient to justify regulating DVD's self-created sub-category of adult bookstore (App. 5a-6a; 42a)—even though the historical definitions of "adult bookstore," like the definitions in Indianapolis and New Albany, do not reference peep show booths. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 53 n.5 (1976) (defining "adult book store"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 255 n.5 (1990) (same).

The Seventh Circuit faulted New Albany's reliance on studies that, in the panel's view, "*principally* reflect the effects of adult businesses that offer live entertainment or peep shows; they do not *necessarily* demonstrate that businesses selling books and DVDs have the same consequences for morals offenses (prostitution, lewd exhibition) or other kinds of crime." (App. 5a) (emphasis added); (App. 6a) (observing that "studies had lumped bookstores, peep shows, and exotic dancing establishments together").

To support its position, the panel quoted a portion of the trial court's decision concerning Dr. McCleary's testimony, but the entire statement, in context, supports the City. (*Compare* App. 5a *with* App. 23a) (noting Dr. McCleary's testimony that "sexually oriented businesses, as a class that includes retail-only adult bookstores, generate significant ambient public safety hazards").

The Seventh Circuit also ignored the City's evidence about the negative impact of adult bookstores on nearby residential property values, likely due to the panel's misreading of the record. (App. 2a.) DVD is adjacent to a residence and 115 feet from a residential zoning district. (App. 17a) (citing R. 77, Exh. A). The panel mistakenly thought that a disqualifying residential building was "proposed," when in fact "proposed" described DVD's then-unopened adult bookstore. The City identified this error in its unsuccessful *en banc* petition.

The panel thus addressed only the secondary effects of crime and litter. The court characterized the City's crime-control interest as concerning only "theft," and then discounted Dr. McCleary's discussion of

routine activities theory—a "well-known framework" explaining how "crime occurs in specific locations where motivated offenders come together with suitable crime targets in the absence of capable guardianship." Smith, et al., *Furthering the Integration of Routine Activity and Social Disorganization Theories*, 38 Criminology 489, 490 (2000). The panel stated: "The theft argument is paternalistic. Why can't customers make their own assessments of risk? . . . . The police must protect the readers from the hecklers or thieves, rather than ease their workload by forbidding the speech." (App. 6a.)

Citing the burden-shifting language in the *Alameda Books* plurality opinion, 535 U.S. at 438-39, the panel held that the alleged lack of "good" evidence in the record, "coupled with evidence implying that take-home adult stores do not have adverse secondary effects," *i.e.*, Dr. Linz's testimony, "is enough to require an evidentiary hearing" (App. 7a)—even though secondary effects had been the subject of at least nine (9) briefs and fifty-three (53) exhibits in the district court, and that court *had already held a full evidentiary hearing*.

Next, the Seventh Circuit turned to the City's interest in controlling litter, a secondary effect documented in numerous places in the legislative record. (R. 76, Exh. C-8 (Phoenix); Exh. C-9 (Renton); Exh. C-10 at 11 (St. Paul); R. 104, Exh. B (Spokane)). Rejecting the Ninth Circuit's on-point decision in *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195 (9th Cir. 2004)—as well as the City's reliance on that case and the *same evidence Spokane relied upon*—the panel held that empirical proof was necessary. (App. 8a) ("Plaintiff has

been in operation for a while now; is sexually themed litter a problem near its store?").

Invoking Justice Kennedy's *Alameda Books* concurrence as a new evidentiary standard (App. 8a-9a), the court held that the City must:

> establish (a) how much sex-oriented litter an adult bookstore generates; (b) who is likely to see that litter in the parts of New Albany where adult bookstores are allowed to operate; and (c) how much adult litter will remain in New Albany's central business area (generated by adult corners of other businesses) if plaintiff is exiled to an industrial district or highway.

(App. 9a.)

Because the panel's decision supplants the "any evidence that is 'reasonably believed to be relevant'" standard announced in *Renton* and reiterated in *Alameda Books*—and creates a split in the circuits on the legal standard for secondary effects ordinances—the City petitions for review.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to resolve a deep split—and extensive confusion—among the circuits as to the legal standard for evidence supporting secondary effects ordinances. As Chief Judge Easterbrook explained, "dozens of appellate decisions . . . have struggled to understand and apply *Alameda Books*," and the resulting patchwork of opinions does "more to show the problems of interpretation and application created by the fractured

decision in *Alameda Books* than to establish any concrete legal rule." (App. 44a.)

Second, the Seventh Circuit's standard—that a city must provide specific evidence "that the restrictions actually have public benefits great enough to justify" the regulation—contradicts *Renton* and its progeny, which hold that a city: (1) may rely on any evidence "reasonably believed to be relevant" to its goal of preventing secondary effects, *Alameda Books*, 535 U.S at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring in judgment); and (2) need not produce "empirical data . . . that its ordinance will successfully lower crime." *Id.* at 439 (plurality opinion).

The decision below requires the City to provide empirical proof to justify a buffer between adult bookstores and homes—even though when this case began, no adult bookstores existed in New Albany. The decision thus requires cities to experience adverse impacts before regulating to prevent them, effectively turning *Renton's* core principle on its head.

I. The Circuits Are Split Over How to Apply the *Renton* Standard in Light of *Alameda Books*

In the last twenty-four years, myriad cities have relied on *Renton* to adopt and defend adult business ordinances. But *Renton's* progeny is a series of decisions marked by differing rationales and plurality opinions. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

In *Alameda Books*, the most recent case, the plurality opinion introduced a burden-shifting paradigm for testing secondary effects legislation:

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

535 U.S. at 438-39 (plurality opinion).

Justice Kennedy concurred separately to state that the "rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech." *Id.* at 450 (Kennedy, J., concurring in judgment).

The plurality, in rejecting the adult bookstores' quest for strict scrutiny, agreed with Justice Kennedy's proposition and considered it to be "simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." *Id.* at 443 (plurality opinion).

The circuit courts—while agreeing that Justice Kennedy's concurrence states the *Alameda Books* holding per *Marks v. United States*, 430 U.S. 188 (1977)—are in conflict and disarray over the meaning and application of both the plurality's burden-shifting analysis and Justice Kennedy's concurrence.

A. The confusion stemming from *Alameda Books* has produced three related questions over which the circuit courts are fundamentally divided: (1) whether a city must provide evidence proving the efficacy of its regulation, (2) whether the evidence has to be specific to the exact activity regulated, and (3) whether the evidence must prove that adult businesses' adverse effects are comparatively *greater* than those of non-adult businesses.

1. The Seventh Circuit, applying Justice Kennedy's concurrence as an evidentiary standard—rather than as the rationale for applying intermediate, instead of strict, scrutiny—answers the first question in the affirmative. Under intermediate scrutiny, "to prevail, the City needs evidence that the restrictions actually have public benefits great enough to justify" the regulation. (App. 35a); *see also* (App. 45a) (if the city "cannot produce such evidence, satisfying Justice Kennedy's cost-benefit standard," its ordinance must be stricken); (App. 9a) (city must supply evidence concerning "how much adult litter will remain in New Albany's central business area" after DVD is excluded).

Other circuits, applying the evidentiary standard articulated in the *Alameda Books* plurality opinion, answer the first question in the negative. In *Daytona Grand, Inc. v. City of Daytona Beach*, the Eleventh

Circuit rejected Dr. Linz's challenges to the secondary effects record and explained that in *Alameda Books*, "the plurality *criticized* Justice Souter's dissent for 'rais[ing] the evidentiary bar' by "ask[ing] the city to demonstrate, not merely by appeal to common sense, *but also with empirical data*, that its ordinance will successfully lower crime.'" 490 F.3d 860, 880 & n.30 (11th Cir. 2007) (emphasis in original) (quoting *Alameda Books*, 535 U.S. at 438 (plurality opinion)).

The Ninth Circuit is in accord. Ironically, in rejecting an empirical proof requirement, the Ninth Circuit quoted, *verbatim*, *earlier Seventh Circuit precedent* that *Annex Books* and the decision below effectively overrule:

> Justice Kennedy's position is not that a municipality must *prove* the efficacy of its rationale for reducing secondary effects *prior* to implementation, as Justice Souter and the other dissenters would require, *see generally Alameda Books*, 122 S. Ct. at 1744-51; but that a municipality's *rationale* must be *premised* on the theory that it '*may* reduce the costs of secondary effects without substantially reducing speech.'"

Center for Fair Public Policy v. Maricopa County, 336 F.3d 1153, 1163 (9th Cir. 2003) (quoting *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721 (7th Cir. 2003) (emphasis in original) (quoting *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring))).

Emphasizing the failure of *Alameda Books* "to establish any concrete legal rule," Chief Judge Easterbrook attempts to distinguish the result in

Maricopa County on the grounds that the "plaintiffs had not undermined the justifications" for the regulation. (App. 44a.) But under the decisions below, this distinction is doctrinally irrelevant: if a city has a duty to provide "evidence that the restrictions actually have public benefits great enough to justify" the regulation, (App. 35a), then the city's failure to provide such evidence fells the ordinance, irrespective of the plaintiffs' duty to challenge such evidence—a duty that presumably ripens only when the city fulfills its initial duty. Indeed, the Seventh Circuit concluded that both Indianapolis and New Albany failed to supply sufficient evidence *before* its decisions addressed the plaintiffs' challenges. (App. 35a-39a) (discussing the alleged failures of Indianapolis's evidence before addressing expert testimony); (App. 5a-7a) (concluding that "New Albany has not supplied evidence that 'fairly supports'" its ordinance); (App. 8a-9a) (requiring New Albany to conduct an empirical study based on the *panel's* criticism of the City's evidence).

Either a city has to provide evidence of the efficacy of its regulation, or it does not. The divide is intractable; it flows from disagreement concerning the governing legal standard.

2. This disagreement manifests itself in a second and related question over which the federal appellate courts are split: whether a municipality's evidence must be specific to the exact activity—*i.e.*, the plaintiffs' self-defined subcategory of adult business—that the city seeks to regulate. The Seventh Circuit, following the Fifth, holds that it must, contrary to authoritative decisions of the Sixth, Eighth, and Tenth Circuits.

The Seventh Circuit accepted DVD's argument that New Albany has not proven that retail-only adult bookstores "cause any untoward secondary effects." (App. 5a.) The panel opined that "*Alameda Books* and *Playtime Theatres* held that *proof of such effects is essential*" to justify regulations such as New Albany's. (*Id.*) (emphasis added). The panel concluded that studies "lumping bookstores, peep shows, and exotic dancing establishments together" are insufficient. (*Id.*); *see also* (App. 40a) (faulting Indianapolis for not "adducing data to support the regulation of bookstores that do not furnish on-site viewing").

The panel's exacting requirement of specificity in the legislative evidence supporting a secondary effects ordinance contravenes prior Seventh Circuit authority. In *G.M. Enterprises, Inc. v. Town of St. Joseph*, the Seventh Circuit analyzed *Alameda Books* and held that the "plurality did *not* require that a regulating body rely on research that targeted the *exact activity* it wished to regulate," so long as the "reasonably believed to be relevant" standard is satisfied. 350 F.3d 631, 639 (7th Cir. 2003) (emphasis added).

The Seventh Circuit's new, heightened standard for legislative evidence follows (App. 45a), and is consistent with, the Fifth Circuit's standard in *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied* 540 U.S. 982 (2003). Citing the *Alameda Books* plurality, the Fifth Circuit invalidated San Antonio's adult business zoning ordinance due to the City's failure to provide "evidence of the secondary effects of establishments that sell adult products solely for off-site consumption." *Id.* at 295.

The Fifth Circuit acknowledged the contrary results reached on the same question by the Eighth and Tenth Circuits. *Id.* In *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), the city defended its zoning ordinance with secondary effects studies including, *inter alia*, the 1984 Indianapolis study. Rejecting an adult bookstore's claim that the ordinance is invalid for want of evidence specific to adult bookstores lacking "facilities for on-premises consumption," the Eighth Circuit held:

> Rochester relied upon studies that identified specific adverse secondary effects attributable to adult bookstores. The City reasonably believed that evidence was relevant to the problems addressed by Ordinance No. 2590. Even if Downtown Book and Video is a new type of adult business, it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses.

Id.

The Tenth Circuit expressly followed *ILQ Investments* in *Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), a case in which the city defended its adult bookstore zoning restriction based on studies from Garden Grove, Austin, Oklahoma City, Indianapolis, Whittier, and Amarillo, *id.* at 687 n.1—*all* of which are in New Albany's record. (R. 76, Exhs. C-1 through C-7.) Observing that Aurora's "ordinance does not attempt to regulate businesses which have a minimal or nonexistent connection to sexually oriented entertainment," and that plaintiff, "and businesses like it, are indisputably sexually

oriented businesses," the Tenth Circuit held that "[t]he legislative record before the city fully supported the city's concerns" in regulating retail adult bookstores to prevent "secondary effects caused by sexually oriented businesses, such as decreased property values and increased crime . . . ." *Id.* at 690.

In *Annex Books* and *New Albany DVD*, the Seventh Circuit joined this long-running circuit split on the side of the Fifth Circuit (*Encore Videos*) and opposite the Eighth Circuit (*ILQ Investments*) and the Tenth Circuit (*Z.J. Gifts*). Before addressing a recent decision from the Sixth Circuit, discussed *infra*, that deepened the split, Chief Judge Easterbrook sought to *distinguish* another "retail-only" decision from the Fifth Circuit. (App. 44a.)

In *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), the Fifth Circuit purported to apply its holding in *Encore Videos*, but reached a different result because the 1984 Indianapolis and 1986 Oklahoma City studies upon which Kennedale (and New Albany) relied "included surveys of real estate appraisers that focused strictly on 'adult bookstores,'" and "the overwhelming majority of survey respondents in both studies predicted that the presence of an adult bookstore would negatively affect real estate value in the surrounding area." *Id.* at 339-40. Finding that these concerns "are equally applicable to an on-site or off-site establishment," the Fifth Circuit upheld the ordinance. *Id.*

In doing so, the *H & A Land* panel observed that "the Supreme Court has previously used the term 'bookstore' as distinguishable from 'adult video arcades.' *Alameda Books*, 535 U.S. at 442, 122 S.Ct.

1728 (discussing city's prohibition on 'combination of adult bookstores and arcades')," and that what matters is how the real estate appraisers would have understood the survey's reference to "adult bookstore." 480 F.3d at 340. Given that the dictionary definition of "bookstore" is simply "a place where books are the chief stock in trade"—and that there is "no reason to expect that simply adding the word 'adult' to the term would completely transform the nature of the business activity described"—it was "reasonable for Kennedale to believe that the appraisers responding to the survey understood the term 'adult bookstore' to mean off-site businesses . . . ." *Id.*

Chief Judge Easterbrook criticizes *H & A Land Corp.* for crediting Kennedale's reliance on the Indianapolis study because the study "does not differentiate by type of adult business" and does "not *define* 'adult bookstore.'" (App. 44a.) These criticisms are not fact-driven; rather, they beg the central question: must a city have research targeting the *exact* adult business activity it wishes to regulate, or is it entitled to rely on "any evidence reasonably believed to be relevant" to the problem it seeks to address? If the latter, then the question is whether "its inferences appear reasonable," *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring in judgment), and if they do, the legislative judgment should be credited. *ILQ Investments, Z.J. Gifts*, and *H & A Land* demonstrate that the inferences are reasonable.

One additional observation further illustrates the disarray in the circuit courts on this issue. San Antonio relied on the Garden Grove study, 330 F.3d at 295, which study also includes a real estate survey "that focused strictly on 'adult bookstores.'" (*See* R. 76,

Exh. C-2 at 61-72.) Thus, all of the observations made by the *H & A Land* panel apply with equal force to the study in the *Encore Videos* record. The results of the two Fifth Circuit cases conflict not because of differing records, but simply because the *Encore Videos* panel refused to permit San Antonio to draw a reasonable inference from its secondary effects evidence, while the *H & A Land* panel permitted Kennedale to draw the same inference.

Most recently, the Sixth Circuit deepened the circuit split with *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009) (Boggs, C.J.). Upholding an ordinance against challenges brought by a retail-only adult bookstore, the court—citing *Alameda Books* and the Seventh Circuit's *G.M. Enterprises* case—rejected a heightened specificity requirement for secondary effects evidence: "Requiring local governments to produce evidence of secondary effects for all categories created by every articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence 'reasonably believed to be relevant.'" *Id.* at 526.

Moreover, citing *H & A Land Corp.* and the Ninth Circuit's decision in *World Wide Video* (discussed below), the Sixth Circuit held that Knox County met its evidentiary burden because "[t]he Indianapolis and Oklahoma studies relied on by Kennedale and the testimonial evidence relied on by Spokane were also included among the findings made by the County in enacting the Ordinance." *Id.* at 525.

This case presents an ideal opportunity for the Court to answer the recurring legal question of

whether cities must produce specific evidence concerning each sub-category of sexually oriented business activity they seek to regulate. This circuit split has been percolating since 2003, when the Fifth Circuit disagreed with the Eighth and Tenth Circuits and this Court denied San Antonio's petition for certiorari. 540 U.S. 982. The split has only deepened over time, with the Seventh Circuit joining the Fifth Circuit on one side and the Sixth joining the Eighth and Tenth Circuits on the other.

3. This case also squarely presents a third, interrelated question on which the circuits are divided, namely whether legislative secondary effects evidence–even evidence specific to the subcategory of adult business at hand–must be "scientific" in that it employs comparative analysis demonstrating that adult businesses' adverse impacts are *greater* than those of non-adult businesses.

The Seventh Circuit's position is clear. In analyzing Indianapolis's hours of operation regulation for adult bookstores, Chief Judge Easterbrook discussed record evidence of "41 arrests for public masturbation at Annex Books" during a one-year period. Describing the insufficiency of this evidence to establish the city's secondary effects interest, the Court stated:

> Indeed, we do not know when the arrests occurred. Unless most of them were after midnight, or on Sunday, *they don't justify the ordinance even with respect to establishments that supply entertainment on the premises*. Nor can we tell whether 41 arrests at one business over the course of 365 days is a large or a small number. *How does it compare* with arrests for

> drunkenness or public urination in or near taverns, which in Indianapolis can be open on Sunday and well after midnight? If there is more misconduct at a bar than at an adult emporium, how would that justify greater legal restrictions on the bookstore—much of whose stock in trade is constitutionally protected in a way that beer and liquor are not.

(App. 38a) (emphasis added).

The Seventh Circuit's position thus embraces a *non sequitur* advanced by the industry in every secondary effects case: that if a given *non*-adult business has greater secondary effects than an adult business, there is no substantial government interest in regulating to prevent the adverse impacts of the adult business.

A corollary of the Seventh Circuit's comparative-analysis standard is the required elimination of other potential explanations for secondary effects. (App. 39a) (holding that Indianapolis can rely on other cities' evidence only if "a suitable effort is made to control for other variables"); (App. 40a-41a) (citing Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, Reference Manual on Scientific Evidence (2d ed.) (Federal Judicial Center 2000), and instructing that "a multivariate regression would provide a better foundation" for secondary effects evidence "than either a time series or a geographic cross-section").

Indeed, in criticizing the 1984 Indianapolis study's survey of certified real estate appraisers—which the *H & A Land* panel explained "was drafted by experts, pretested, and administered to a large, national pool of respondents"—the Seventh Circuit faulted it both for:

(1) being insufficiently scientific, (App. 44a) ("An opinion poll differs from a concrete result"), and (2) failing to eliminate alternate explanations for secondary effects. (App. 45a) (noting that the study "concludes that prices appreciate less in parts of the City where adult businesses congregate," but opining that the study fails to prove that adult businesses *cause* lower appreciate rates).

The Seventh Circuit's application of this "scientific" standard to New Albany's record highlights the circuit split on this issue. As noted above, New Albany relied on evidence of litter problems from several cities around the country, including Spokane, Washington. Based on this evidence of "pervasive litter, including used condoms, empty liquor bottles, and video packaging featuring graphic depictions of sexual acts," *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1190 n.6 (9th Cir. 2004), the Ninth Circuit upheld Spokane's zoning restrictions for retail-only adult bookstores. In fact, the court held that "elimination of pornographic litter, by itself, represents a substantial governmental interest." *Id.* at 1195 (internal citation and quotation marks omitted).

In reaching this conclusion, the Ninth Circuit agreed with First, Sixth, and Eleventh Circuits, and the New York Court of Appeals, that "[a]necdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects . . . ." *Id.* at 1195-96 (quoting *Stringfellow's of N.Y., Ltd. v. City of New York*, 694 N.E.2d 407 (N.Y. 1998)); *accord National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 742 (1st Cir. 1995) ("A legislative body can act without first acquiring irrefutable proof. In other words,

lawmakers need not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels."); *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512, 527 (6th Cir. 2009) (holding that county could rely on anecdotal evidence for its secondary effects showing).

The Eleventh Circuit's recent decision in *Flanigan's Enterprises, Inc. of Georgia v. Fulton County*, No. 08-17035, --- F.3d ---, 2010 WL 520542 (11th Cir. Feb. 16, 2010) is instructive on this issue for two reasons. First, it reaffirms prior circuit precedent holding that because many secondary effects never result in a call for police service, "the City's 'anecdotal' evidence may be a more accurate assessment" for certain secondary effects than police call data. *Id.* at *13 (quoting *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 882-83 (11th Cir. 2007)). In fact, the *Daytona Grand* court—citing the Seventh Circuit's prior decision in *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003)—rejected the adult businesses' reliance on the testimony of Dr. Daniel Linz, in part precisely because legislative evidence need not be scientific. 490 F.3d at 883.

The Eleventh Circuit stated:

> We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on CAD data to cast direct doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the City of Daytona Beach here. *See Gammoh v. City of La Habra*, 395 F.3d 1114, 1126-27 (9th Cir. 2005); *G.M. Enters., Inc.*, 350 F.3d at 639; *SOB, Inc.*, 317 F.3d at 863

> & n.2. Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases. *See G.M. Enters., Inc.*, 350 F.3d at 635-36, 639; *SOB, Inc.*, 317 F.3d at 863.

490 F.3d at 883 n.3; *see also Doctor John's v. Wahlen*, 542 F.3d 787, 792 (10th Cir. 2008) (upholding regulation of retail-only adult bookstore while observing that "the Supreme Court has 'flatly rejected [the] idea' of requiring cities to rely on empirical analysis. . . . In fact, among the specific empirical studies that the Supreme Court rejected in *City of Erie* [*v. Pap's A.M.*, 529 U.S. 277, 300 (2000)], were Dr. Linz's studies cited by an amicus curiae . . ."); *id.* at 793 (listing cases) ("These courts rejected Dr. Linz's approach because of its reliance on *Daubert* and because requiring municipalities to present empirical data to support an ordinance 'would go too far in undermining our settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech.'") (quoting *Alameda Books*, 535 U.S. at 439 (internal citations omitted)).

Second, the Eleventh Circuit's *Flanigan's* decision squarely rejects the *non sequitur* described above and embraced by the Seventh Circuit: "Even if we were to accept that crime is greater in and around the non-adult establishments—and the record is hotly disputed on this point—a municipality would still be empowered to act in order to check a class of crime it found to be particularly troublesome." 2010 WL 520542 at *13. In other words, contrary to the Seventh Circuit's view, a city still has a governmental interest in preventing problems in and around adult

businesses, even if other businesses in town have similar or greater problems.

The circuit split concerning this issue is plain. New Albany and Spokane relied on the exact same evidence in requiring retail adult bookstores to be separated from churches, schools, and residential neighborhoods. The Ninth Circuit, in accord with the views of three other circuits and New York's highest court, held that non-scientific (anecdotal) evidence can establish a municipality's secondary effects interest.

The Seventh Circuit rejected this view, and held that the City must conduct an empirical time series (*i.e.*, before-after) study, pursuant to the panel's prescribed standards (App. 9a), that shows greater secondary effects (litter specifically) from DVD's adult bookstore than from non-adult businesses (*e.g.*, convenience stores). (App. 9a.)

In imposing this heightened standard, the Seventh Circuit again contravened its decision in *G.M. Enterprises*–which rejected the position advanced by Dr. Linz in this case–and held that:

> A requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

G.M. Enterprises, 350 F.3d at 640.

The Seventh Circuit has rejected both Indianapolis's petition and New Albany's petition to resolve the obvious conflicts with its prior decisions. More important, the Seventh Circuit's new standard plainly conflicts with the authoritative decisions of other United States Courts of Appeals, many of which rely on *prior* Seventh Circuit authorities that properly interpret *Alameda Books*—authorities which have now been effectively overruled. This Court should therefore grant review to bring order to the disarray in the lower courts concerning the standard for evaluating municipal secondary effects legislation.

B. This case presents an ideal vehicle to resolve the circuit split and to clarify that standard. Like *Renton*, this case concerns a place restriction that separates sexually oriented businesses from sensitive land uses (*e.g.*, homes, schools, places of worship, *etc.*). Following *Renton*, the City compiled reported judicial decisions, land use and crime impact reports, anecdotal data, and expert analysis demonstrating a wide range of negative secondary effects associated with adult bookstores and other sexually oriented businesses. No secondary effects case reviewed by this Court has involved a comparable compilation of relevant secondary effects evidence.

Furthermore, the parties fully developed the secondary effects issue in the district court through their briefs, exhibits, and an evidentiary hearing, where both parties offered expert testimony. The district court engaged the experts during that hearing, ultimately concluding that the City met its evidentiary burden under *Renton* and that DVD failed under *Alameda Books* to cast direct doubt on the City's evidence. (App. 22a-24a.) Further proceedings on the

secondary effects issue in the district court are unwarranted.

Nevertheless, the Seventh Circuit demands that the City abandon its secondary effects evidence and start over. Even *if*, after six years of litigation, the City were to develop additional evidence, including a local, empirical study that (eventually) satisfies the Seventh Circuit's heightened standard, this result would only solidify the Seventh Circuit's position that placing such an onerous burden on cities is appropriate. Requiring the City to go beyond its already extensive efforts to justify a now-standard, *Renton*-type buffer between sensitive land uses and adult bookstores is plainly contrary to governing law, which authorizes the City to rely on any evidence "reasonably believed to be relevant" to its legitimate goal of preventing secondary effects.

Although the City seeks review from the entry of a preliminary injunction, Supreme Court review is appropriate because "the question presented is of substantial importance, and . . . further proceedings below would not likely aid [the Court's] consideration of it." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). This Court has often granted certiorari to review First Amendment-based preliminary injunctions against governments. *See, e.g., id.* (certiorari granted to review First Amendment-based preliminary injunction against residential picketing ordinance); *Ashcroft v. ACLU,* 535 U.S. 564 (2002) (certiorari granted to review First Amendment-based preliminary injunction preventing government from enforcing Child Online Protection Act); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (certiorari granted to review First Amendment-based preliminary injunction against

restriction on use of Legal Services Corporation funding). As noted above, the secondary effects issue in this case was fully developed below and resolution of the question presented is "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

Finally, both adult businesses and local governments agree upon the importance of the question presented and the need for guidance. *See, e.g., Daytona Grand, Inc. v. City of Daytona Beach*, No. 07-768, 2007 WL 4340920 (petition of adult business concerning secondary effects decision of Eleventh Circuit); *GM Enters., Inc. v. Town of St. Joseph*, No. 03-1549, 2004 WL 1090884 (petition of adult business concerning secondary effects decision of Seventh Circuit); *City of San Antonio v. Encore Videos, Inc.*, No. 03-163, 2003 WL 22428677 (petition of city concerning secondary effects, noting "Fifth Circuit's 'heightened specificity' rule for secondary effects evidence goes far beyond the threshold requirement established in *Renton*" and predicting that the circuit split would continue to produce different results on recurring issue of constitutional law). This case is the ideal vehicle for revisiting the secondary effects doctrine.

II. The Decision Below Is Wrong Under Both *Renton* and *Alameda Books*

This Court has repeatedly held that a city council, in seeking to prevent the negative secondary effects of sexually oriented businesses, may rely upon "any evidence" that is "reasonably believed to be relevant" to that substantial government interest. *Renton*, 475 U.S. at 51-52; *Alameda Books*, 535 U.S at 438

(plurality opinion); *id.* at 451 (Kennedy, J., concurring in judgment).

Applying this deferential standard, the Court has consistently rejected claims that a city must rely on evidence specific to its regulation or that proves the efficacy of its regulation. Specifically, the Court has upheld adult business regulations where the government relied on: (1) a single judicial decision citing one study that supported a zoning regulation (concentrating adult businesses) opposite of the one adopted in the case (dispersing adult businesses), *Renton*, 475 U.S. at 51; (2) *no* legislative record, but reliance during litigation on *Renton's* findings and contemporaneous judicial decisions documenting secondary effects, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); (3) city council findings citing two cases, but unaccompanied by any extrinsic evidence, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and (4) a single study that the city *admitted* did not address the specific harm targeted by the regulation under review. *Alameda Books*, 535 U.S. at 436.

In each case, this Court reversed appellate decisions that applied more rigorous standards to legislative judgments concerning secondary effects than that called for under *Renton*. *See, e.g., Alameda Books*, 535 at 438-39 (plurality opinion) (rejecting "empirical data" requirement); *City of Erie*, 529 U.S. at 297 (holding that "a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing" is sufficient to justify regulation); *id.* at 300 (plurality opinion) ("flatly reject[ing]" empirical evidence requirement).

New Albany's adult business location restriction is supported by numerous judicial opinions, secondary effects studies, and the opinion of an expert criminologist—a record that dwarfs those involved in any of this Court's secondary effects cases. Nevertheless, the Seventh Circuit holds that it is not enough.

This holding violates *Renton* and its progeny. In purporting to apply *Alameda Books*, the Seventh Circuit never mentions *Renton's* "reasonably believed to relevant" standard in either *Annex Books* or *New Albany DVD*. Instead, the court demands empirical evidence specific to the plaintiffs' self-defined, sub-category of adult bookstore and specific to the type of regulation the City adopted. (App. 5a, 7a) (claiming City failed to provide "good" evidence specific to retail-only adult bookstores); (App. at 6a-7a) (requiring evidence that thefts of passersby are comparatively more problematic at adult bookstores near churches than further from churches).

The Seventh Circuit further requires cities to "control for other variables," (App. 39a), and scientifically eliminate other theories of secondary effects causation. (App. 44a) (discounting real estate appraiser survey and discussing possible views of causation of decreased property values near adult bookstores). The Seventh Circuit requires a city to prove that its regulations "*actually have public benefits great enough* to justify" the ordinance. (App. 35a) (emphasis added); (App. 6a-9a) (requiring quantitative and qualitative comparative analysis to justify efforts to prevent negative impacts of adult bookstores on surrounding properties). Thus, contrary to *Alameda Books*, cities must now "bear the burden of providing

evidence that rules out" alternate explanations of secondary effects, and must provide "empirical data [showing] that its ordinance will successfully lower crime." *Alameda Books,* 535 U.S. at 437, 439 (plurality opinion). All of these requirements go far beyond, and are directly contrary to, the standards established by *Renton* and its progeny. 475 U.S. at 50 (reversing Ninth Circuit decision for applying an "unnecessarily rigid burden of proof").

This Court has specifically rejected the idea that local governments must "await localized proof" of adverse effects, *Barnes,* 501 U.S. at 584, or provide evidence "specifically relating to 'the particular problems or needs'" of the muncipality. *Renton,* 475 U.S. at 50 (internal citations omitted). Yet the Seventh Circuit requires New Albany to suffer localized secondary effects and then conduct an empirical study in order to justify a buffer between adult bookstores and residential neighbors. Because this result runs headlong into this Court's governing precedents, this Court should grant New Albany's petition for a writ of certiorari and reverse the decision of the Seventh Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 24, 2010

APPENDIX

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APPENDIX A

In the United States Court of Appeals
For the Seventh Circuit

No. 05-1286

Filed September 10, 2009
Amended September 16, 2009

NEW ALBANY DVD, LLC,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CITY OF NEW ALBANY, INDIANA,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division.
No. 4:04-cv-00052-SEB-WGH
Sarah Evans Barker, *Judge*.

ARGUED SEPTEMBER 26, 2005
DECIDED SEPTEMBER 10, 2009

Before EASTERBROOK, *Chief Judge*, and RIPPLE and ROVNER, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. New Albany DVD operates an adult store in New Albany, Indiana. It does not provide live or recorded entertainment on site. Customers buy books, magazines, or videos, which they read or watch at home. Plaintiff bought land for this operation in 2003, secured all necessary licenses, and renovated the site's store to meet its requirements. The land was properly zoned for the business it proposed to operate. A final inspection was scheduled for February 19, 2004. But the City refused to carry out that inspection, so plaintiff could not obtain the certificate of occupancy needed to open its doors.

That very day the City Council enacted a six-month moratorium on new adult businesses. In March 2004 the Council amended the zoning rules to forbid any "sexually oriented business" at plaintiff's site. (This phrase includes a book or video retailer if more than 30% of its inventory meets the City's definition of "sexually oriented"; plaintiff's inventory qualifies.) The law prohibits a sexually oriented business from operating within 1,000 feet of a church or any tract zoned for residential use. Plaintiff's store is 175 feet from the nearest church and 115 feet from the site of a proposed residential building.

In this suit under 42 U.S.C. §1983, plaintiff contends that New Albany's ordinance violates the first amendment (applied to the states by the fourteenth) because it is based on the books' and videos' content or subject matter; because it is inadequately justified by proof of adverse secondary effects and therefore cannot find shelter under the holdings of *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *Renton v. Playtime Theatres, Inc.*,

475 U.S. 41 (1986); and because it is not narrowly tailored to the City's justification. Plaintiff also argues that, as a matter of Indiana law, it is entitled to operate for two years as a nonconforming use, because the renovations were completed before the zoning ordinance was amended and the store would have opened before the zoning change had the City conducted the final inspection on schedule. The district court held that the ordinance likely is unconstitutional because not narrowly tailored to its purpose. 362 F. Supp. 2d 1015 (S.D. Ind. 2005). The court also concluded that Indiana law entitles plaintiff to the two-year grace period. An injunction issued in January 2005 allowing plaintiff to open its store.

The parties have devoted considerable attention to the state-law question on appeal, but it has no continuing import because the two years have expired. Plaintiff has been able to operate its store under the protection of the district court's holding that the zoning rules likely violate the Constitution; it makes no difference whether state law also would have allowed the store to operate for two years.

The injunction should not have issued, however—at least, it should not have issued on the ground that the district court gave. Although *Alameda Books* and *Playtime Theatres* hold that regulation of adult businesses must be tailored to the justification for the regulation, these decisions also sustain laws that are no better tailored, and may well be more restrictive, than New Albany's. See also, e.g., *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009); *Fantasyland Video, Inc. v. San Diego*, 505 F.3d 996 (9th Cir. 2007); *Matney v. Kenosha*, 86 F.3d 692 (7th Cir. 1996). See also *Ben's Bar, Inc. v. Somerset*, 316

F.3d 702 (7th Cir. 2003). Plaintiff does not contend that a 1,000-foot dispersal requirement leaves too little space for it (and other adult establishments) to operate in portions of the City suited to bookstores. See *Illinois One News, Inc. v. Marshall*, 477 F.3d 461 (7th Cir. 2007). New Albany maintains, and plaintiff does not deny, that more land is available for adult establishments than is put off limits by this ordinance.

The district court faulted New Albany for banning adult establishments within 1,000 feet of land zoned for housing and suggested that a more appropriately tailored ordinance would limit the rule to occupied residences. But there is no doubt that plaintiff's premises are within 200 feet of a church, so it is unaffected by the distance-to-residential-land rule. It is unaffected, for that matter, by the difference between a 1,000-foot dispersal rule and a 250-foot dispersal rule. The district judge next suggested that New Albany allow the bookstore to be near a church but require it to close while services are being held. Such a privileged position for religious worship would cause problems of its own, see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), unless there were similar closing requirements when schools and other secular establishments were open.

No appellate court has required a city to adopt a rule of the kind that the district court thought necessary. "Narrow tailoring" does not mean that the ordinance must be the least restrictive possible regulation. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). When some regulation is justified, a city has considerable discretion on matters of detail. The sort of zoning rule that New Albany enacted has been

too widely used, and too often sustained, to be upset as "not narrowly tailored."

This does not mean, however, that the injunction must be reversed, for a prevailing litigant is entitled to defend its judgment on any ground preserved in the district court, even if the district judge rejected that argument. Plaintiff defends its judgment with the argument that New Albany has not established that book and video stores offering only take-home items cause any untoward secondary effects. The Supreme Court in *Alameda Books* and *Playtime Theatres* held that proof of such effects is essential if municipalities regulate adult establishments differently from the way they regulate other similar businesses—for the sellers of books and movies enjoy constitutional protections that sellers of snow shovels, shoes, and parakeets do not.

In the district court, New Albany relied on studies conducted in cities across the country. Many of these show that a concentration of adult businesses in a part of a city is associated with higher crime and lower property values nearby. As we observed in *Annex Books, Inc. v. Indianapolis*, No. 05-1926 (7th Cir. Sept. 3, 2009), however, these studies principally reflect the effects of adult businesses that offer live entertainment or peep shows; they do not necessarily demonstrate that businesses selling books and DVDs have the same consequences for morals offenses (prostitution, lewd exhibition) or other kinds of crime. New Albany's own expert "conceded that he knows of no research that shows . . . effects for various subclasses of businesses," such as plaintiff's retail-only store. 362 F. Supp. 2d at 1021.

Recognizing that prior studies had lumped bookstores, peep shows, and exotic dancing establishments together, New Albany offered some anecdotal justifications in the district court. It cited testimony in some earlier cases by people complaining about pornographic litter near adult bookstores, and it suggested that these stores may expose their customers to thefts. The former line of argument rests on the fact that some customers are bound to throw away wrappers, which may have images inappropriate for children. The "theft" line of argument starts with the premise that many customers of adult establishments pay in cash, which makes them a target for thieves.

The theft argument is paternalistic. Why can't customers make their own assessments of risk? The norm under the first amendment is that government must combat harm *to readers* with disclosures rather than prohibitions of speech. See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986). Just as there is no hecklers' veto over speech, there is no "thieves' veto." The police must protect the readers from the hecklers or thieves, rather than ease their workload by forbidding the speech.

Anyway, if an adult bookstore located 200 feet from a church attracts thieves, won't a bookstore located 1,500 feet from a church do the same? Maybe the City's concern is for the worshippers, who may become the thieves' targets when video buyers are unavailable. But if that's so, the City needs some evidence that thefts from passers by are a serious problem—and a

more severe problem for outlets near churches than for outlets farther away. As the plurality opinion in *Alameda Books* put it:

> [A] municipality [cannot] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in [*Playtime Theatres*]. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

535 U.S. at 438–39. New Albany has not supplied evidence that "fairly supports" the idea that adult bookstores located near churches or residences attract thieves who then steal from the local denizens as well as the stores' customers. We don't say that the City will be unable to produce this evidence, but the lack of good evidence to this effect in the record—coupled with evidence implying that take-home adult stores do not have adverse secondary effects—is enough to require an evidentiary hearing. Our opinion in *Annex Books* expands on this reasoning, which need not be repeated here.

Pornographic litter is the City's other principal basis. The printed word often is tossed away, but litter-control justifications have fared poorly as

reasons to regulate pamphlets and other written materials. Compare *Schneider v. State*, 308 U.S. 147 (1939), with *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984). Perhaps smutty litter should be judged by different standards, but first it is necessary to know how serious the problem is. That one pedodontist in Spokane complained about litter from one bookstore, see *World Wide Video of Washington, Inc. v. Spokane*, 368 F.3d 1186, 1197 (9th Cir. 2004), does not do much to establish that this is a serious problem in New Albany (or even in Spokane). The volume of complaints exceeds the number of genuine problems. There are thousands of adult bookstores; it should be easy to find out how much litter they generate, how much of this litter falls into the hands of minors, and whether this is a materially greater problem when one store carries 40% adult books than when lots of stores carry 10% apiece. (Many a convenience store, newsstand, or video rental outlet has an adult nook, which escapes regulation under New Albany's statute.) Plaintiff has been in operation for a while now; is sexually themed litter a problem near its store?

If litter is a problem, can it be curtailed without an equal curtailment of speech? Justice Kennedy, whose vote was essential to the judgment in *Alameda Books*, and whose views therefore constitute the holding of that case, stated that the reduction in adverse secondary effects may not be achieved just by curtailing speech. "A city may not assert that it will reduce secondary effects by reducing speech in the same proportion." 535 U.S. at 449. New Albany's "litter" justification comes perilously close to this, because the amount of pornographic litter may depend linearly on the volume of adult materials sold. The

only way to cut litter by 10% may be to reduce sales by 10%, and such a justification would fail under Justice Kennedy's approach.

New Albany may be able to resuscitate its anti-litter rationale by showing that the zoning law moves litter to where children (and sensitive pedodontists) won't see it. Placing businesses where they will be equally productive but less harmful is a lawful objective of zoning. *Alameda Books*, 535 U.S. at 446–47 (Kennedy, J., concurring). But, for this justification to work, it will be necessary to establish (a) how much sex-oriented litter an adult bookstore generates; (b) who is likely to see that litter in the parts of New Albany where adult bookstores are allowed to operate; and (c) how much adult litter will remain in New Albany's central business area (generated by adult corners of other businesses) if plaintiff is exiled to an industrial district or highway. Otherwise evidence about litter cannot support the sort of regulation that New Albany has enacted.

The district court needs to take evidence and apply intermediate scrutiny to New Albany's ordinance. The case is remanded for proceedings consistent with this opinion and *Annex Books*. The injunction should remain in place pending the outcome of this hearing.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

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FINAL JUDGMENT

September 10, 2009

BEFORE:

FRANK H. EASTERBROOK, Chief Judge
KENNETH F. RIPPLE, Circuit Judge
ILANA DIAMOND ROVNER, Circuit Judge

No.: 05-1286	NEW ALBANY DVD, Plaintiff - Appellee v. CITY OF NEW ALBANY, INDIANA, Defendant - Appellant

Originating Case Information:
District Court No: 4:04-CV-00052-SEB-WGH Southern District of Indiana, New Albany Division District Judge Sarah Evans Barker

The case is REMANDED for proceedings consistent with this opinion and *Annex Books* in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

4:04-cv-00052-SEB-WGH

[Filed January 3, 2005]

NEW ALBANY DVD, LLC,
Plaintiff,

vs.

CITY OF NEW ALBANY, INDIANA,
Defendant.

ENTRY GRANTING PLAINTIFF'S SECOND MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiff's Second Motion for Preliminary Injunction of Defendant's adult entertainment code, Ordinance G-04-10. Two evidentiary hearings on the issues of the constitutionality of the code and the applicability of the amortization provision of the ordinance to Plaintiff precede this order. On May 5, 2004, we primarily heard testimony on the factual and legal predicate for Defendant's closure of Plaintiff's business. It was agreed that the parties would complete any outstanding administrative procedures and report to

the Court by May 30, 2004. On November 9, 2004, we heard expert testimony on the First Amendment issue of whether the Defendant's adult entertainment ordinance is a lawful "time, place and manner" restriction. For the reasons given below, we GRANT Plaintiff's motion and enjoin enforcement of the ordinance until the Court's resolution of the substantive merits of the case.

Factual Background

The facts appear elsewhere in greater detail; see this court's entries from July 22, 2004, granting the City's Motion to Remand,[1] and July 22, 2004, denying the City's Motion to Dismiss.[2] Nevertheless, we include a summary of those facts relevant to the issues before us in this motion.

Defendant, City of New Albany ("City"), enacted an adult entertainment ordinance in March 2004. Plaintiff, New Albany, DVD ("DVD"), is a retail business located at 601 West Main Street in New Albany which, despite its intent to sell and rent sexually explicit materials for take-home use only, is not currently in operation. It is DVD's inability to operate at that location that has given rise to this litigation.

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[1] Cause No 4:04-CV-0086-SEB-WGH, City of New Albany v. NA DVD, LLC.

[2] Cause No. 4:04-CV-0052-SEB-WGH, NA DVD, LLC v. City of New Albany

I. *Background Facts*

Plaintiff purchased the West Main Street property in 2003. The property was, at the time of purchase, zoned for commercial uses.[3] Plaintiff remodeled the building[4], and upon completion, scheduled the final inspection required for the issuance of a Certificate of Occupancy ("CO"). The morning of the final inspection, February 19, 2004, Plaintiff was told by a city official that the inspection had been cancelled for DVD's failure to comply with certain building and zoning provisions.[5] Later that evening, February 19, 2004, the New Albany City Council met and adopted a six-month moratorium on the authorization of any licensing of a sexually oriented business.[6] The

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[3] See Pl's Response to Def' Reply, Dkt # 21, Ex. 7 (Zoning Verification Form, March 22, 2004, states that 601 West Main St. is zoned C-2; General Business).

[4] Plaintiff received a permit from the Building Commission to remodel a "retail business in a commercial zone."

[5] The final inspection was cancelled by Building Commissioner, Eddie Hancock, for DVD's failure to obtain an improvement location permit ("ILP") from, and submit a site plan and parking plan to, the Planning and Zoning Office, as required by § 156.41 of the New Albany Code. An ILP and CO must be applied for from the City Zoning Officer under § 156.41 when a person or business "seeks to erect, construct, reconstruct, extend, structurally alter or move a structure when land or a building or structure is changed in use." The application must be accompanied by a plot plan or detailed site development plan Dkt. #19; Rosenbarger Aff. ¶¶ 4-5.

[6] Resolution No. R-04-10 reads, in pertinent part:

> "The City Council hereby institutes a moratorium to temporarily prohibit such business from opening or

moratorium was supplanted a month later, on March 18, 2004, by the enactment of Ordinance G-04-10 ("the Ordinance"), the scope of which is the regulation of sexually oriented businesses. See infra.

On the morning of February 19, 2004, Plaintiff was prevented from operating its business for failing to complete city building and zoning requirements. The next day, Plaintiff faced a second obstacle to opening for business when its intended commercial use was banned by the moratorium. Within a month, a third obstacle to its operating an adult book and video store at 601 West Main Street was created by the enactment of the new Ordinance which prohibited operation of a sexually-oriented business within 1,000 feet of a church, since DVD's premises are located within 1,000 feet of the Main Street United Methodist Church at 516 West Main Street.

Undaunted by the mounting and shifting obstacles, DVD applied for the ILP at the conclusion of the May 5th hearing, which application was rejected by the City on May 14, 2004, for the following stated reasons: (1) the zoning restrictions contained in the Ordinance prohibited an adult business from operating in that location[7]; and (2) even if the proposed use were permitted, there were miscellaneous safety issues relating to parking spaces and the location of the pole sign. Status Report, Docket # 61, Exhibit, Letter dated May 14, 2004. DVD subsequently submitted an

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locating in the City of New Albany. This moratorium will take affect [sic] immediately upon passage . . . ".

[7] Dkt # 61, Status Report, Appendix Tab B.

amended application for an ILP, which, again, also was rejected, this time solely for the reason that the recently enacted Ordinance forbids the plaintiff's proposed use. The City acknowledged that the miscellaneous other problems had been satisfactorily resolved. Docket # 77, Exhibit, Letter dated July 19, 2004, page 2.

II. *The Ordinance*

The Ordinance targets sexually oriented businesses as a category of commercial uses associated with a "wide variety of adverse secondary effects including ... personal and property crimes, illicit and unsanitary sexual activity, illicit drug use, decreased desirability of and negative impacts on the use of surrounding properties, blight, litter, and sexual assault and exploitation." Ordinance Sec. 1(B). One type of "sexually oriented business" defined by the Ordinance is the "Adult Video Store" or "Adult Bookstore" which dedicates thirty percent (30%) or more of its stock-in-trade to books, magazines, films and video cassettes which depict "specified sexual activities" or "specified anatomical areas." Ordinance Sec. 2(H)(1). Plaintiff meets this definition of a sexually oriented business and, thus, is subject to provisions regulating location, permits, inspections, hours or operation and configuration of the premises.

The most immediate obstacle to Plaintiff's lawful operation is its location. Section 3(A) of the Ordinance,

also Section 156.079 (m)(b)(2) of the City Zoning Code,[8] makes it a violation to establish, operate, or cause to be operated an adult bookstore: (1) within 1,000 feet of a house of worship; (2) within 1,000 feet of a residential district; and (3) within 500 feet of any dwelling. As noted above, DVD's premises are located 175 feet from the Main Street United Methodist Church. Additionally, in rejecting DVD's ILP, the City[9] cited DVD's proximity to a residential district ("[a]n R-4, Multi-Family, high density district is located 115 feet to the north of the proposed site) and to an adjacent dwelling.

Although with respect to its motion for preliminary injunction, DVD asks the Court to consider the overall constitutionality of the Ordinance, DVD might still be able to operate despite the zoning restrictions, apart from its constitutionality, if the amortization provision in the Ordinance were found to apply to DVD. The amortization provision reads, in pertinent part:

> A pre-existing "Sexually Oriented Business," lawfully existing in all respects prior to the effective date of this ordinance, may continue to operate for two (2) years following that date in order to make a reasonable recoupment of its investment in its current location.

Ordinance, Section 4(A).

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[8] See, also Ordinance Z-04-20, amending the Sexually Oriented Business Ordinance, and passed on May 5, 2004. See Docket # 014, Part 2, Ex. 2.

[9] See July 19, 2004, letter from Zoning Officer John Rosenbarger, Dkt. #77.

In other words, under this section, if DVD were a lawfully existing sexually oriented business in February 2004, it would be considered a nonconforming use under the subsequently enacted Ordinance, which would permit Plaintiff to operate at its current location for two (2) years in order to recoup its losses. We address each of these issues below.

Legal Analysis

I. *Preliminary Injunction Standard.*

A preliminary injunction is an extraordinary remedy intended to preserve the status quo until the merits of a case may be resolved. Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 770 (7th Cir. 2001). To obtain the injunction, a plaintiff must show: (1) a reasonable likelihood of success on the merits; (2) that it has no adequate remedy at law; (3) that it will suffer irreparable harm if an injunction does not issue; (4) that the threatened injury it faces outweighs the injury defendant will suffer if the injunction is granted; and (5) that an injunction is in the public interest. Although these elements are theoretically distinct, in the First Amendment context they essentially reduce to the question of whether plaintiff is likely to succeed on the merits. Tanford v. Brand, 883 F.Supp. 1231, 1237 (S.D. Ind. 1995) (Barker, C.J.).

II. *Likelihood of Success on the Merits.*

A. The Constitutionality of the Ordinance.

The City is constitutionally permitted to impose requirements on adult bookstores, which would

otherwise act as a prior restraint on protected speech, only if they are proper time, place or manner restrictions narrowly tailored to serve a significant governmental interest unrelated to the suppression of free expression and leave open alternative channels of communication. Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th 2002). DVD contends that the Ordinance fails to meet the standard for a constitutional time, place, and manner restriction on protected speech as set forth in City of Renton v. Playtime Theatres, Inc., 474 U.S. 41 (1986) and City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002). The Seventh Circuit has recently summarized the current standard on adult entertainment regulations thus:

> "The [Supreme] Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations. A time, place, and manner regulation of adult entertainment will be upheld if it is "designed to serve a substantial government interest and ... reasonable alternative avenues of communication remain[ ] available." Additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's interest."

Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 713 -714 (7th Cir. 2003) (alterations in original) (internal citations omitted).

1. Substantial Government Interest

The City advances the following "straightforward rationale" for the Ordinance:

> "sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, illicit and unsanitary sexual activity, illicit drug use, decreased desirability of and negative impacts on the use of surrounding properties, blight, litter, and sexual assault and exploitation. The City has a substantial government interest in preventing each of the aforementioned adverse effects.

Ordinance No. G-04-10, Section 1(B). Def.'s Mot. in Limine at 3; Docket # 99.

The Renton standard (modified by Alameda Books) allows a municipality to rely on evidence it "reasonably believed to be relevant" to the problem it addresses, even if the evidence is neither local nor recent. Renton, 475 U.S. at 51-52; Alameda Books, 535 U.S. 438 (plurality opinion); id. at 451 (Kennedy, J., concurring) ("we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required") (*citations omitted*). The City maintains it has satisfied the standard by considering a wide range of sources - land use studies and crime impact reports, previous

judicial opinions and non-local anecdotal reports of adverse impacts[10] - when it enacted the Ordinance.

Plaintiff does not dispute the quantum of evidence relied upon by the City; the standard is, admittedly, a minimal evidentiary standard.[11] Instead, the quarrel is with the type or nature of the evidence. Plaintiff argues that the data the City imported into the legislative record should be specific to the sub-category of adult entertainment business it seeks to regulate; the "retail-only" adult bookstore, of which DVD is a prime example. In the adult entertainment sector, the term "adult bookstore" is sometimes used in a generic sense and does not distinguish between retail stores which exclusively sell "take-home" materials (such as DVD) and those which also feature viewing booths for "on-site" consumption of sexually explicit materials.[12]

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[10] Exhibits of pornographic litter relied upon in World Wide Video of Washington, Inc. V. City of Spokane, 227 F. Supp 2d 1143 (E.D. Wash 2002), *aff'd* 368 F.3d 1186 (9th Cir. 2004).

[11] Indeed, it seems that only a legislative record thoroughly devoid of studies, judicial opinions, or experience-based testimony is considered to be sub-standard. See, e.g. R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 411 (7th 2004) (holding that a critical deficiency of the regulation was the lack of evidence connecting the regulated business and the harm that allegedly motivated the regulation).

[12] Although the distinction between sexually oriented businesses which offer on-site entertainment versus those which only offer off-site entertainment is immaterial to our ruling on this motion, we note that the distinction was found relevant in Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003), cert. denied, 540 U.S. 982 (2003) but irrelevant in Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998), cert. denied, 526 U.S. 868 (1998) (holding the distinction "constitutionally

The parties offered expert testimony at the November hearing on this issue. Plaintiff's expert, Dr. Linz, testified that no study has ever been conducted establishing and linking retail-only establishments to adverse secondary effects, perhaps for the reason that this type of store, i.e., strictly retail sales, is a relatively new commercial venture and post-dates the majority of the studies which cities around the country have relied upon for evidence of adverse secondary effects. Hearing Transcript at 19, 28. In addition, DVD offered its own evidence that other businesses in New Albany which sell adult materials, but are not regulated by the Ordinance, actually experienced less crime than similar businesses which do not sell adult materials.[13] This proffer was intended to challenge the City's rationale that sexually oriented business are more readily associated with criminal activity than other types of business. As for the problem of pornographic litter that may be associated with adult entertainment businesses, DVD correctly states that the City has offered no testimony or local empirical data to support the proposition, aside from importing anecdotal evidence found in the legislative record of Spokane, Washington as support for its rationale.[14]

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irrelevant"). See also, Dr. John's, Inc. v. City of Roy, Utah, 333 F.Supp.2d 1168 (D. Utah 2004).

[13] Plaintiff compared police "calls for service" to two video stores which carry adult materials, Movie Gallery and J&J Video, with "calls for service" to Blockbuster Video and Hollywood Video, which do not. Pl 's Reply Br , Embry Aff., Docket # 84.

[14] Def.'s Aff of Marcey Wisman, Exhibit B (part 3), Docket # 104.

In contrast, Defendant's expert, Dr. McCleary, stated that the generic body of data imported into the Ordinance is an adequate factual predicate for the law because it demonstrates that sexually oriented businesses, as a class that includes retail-only adult bookstores, generate significant ambient public safety hazards. Def.'s Opp'n Br., Docket #89, McCleary Second Report, p. 2. Although Dr. McCleary conceded that he knows of no research that shows different effects for various sub-classes of businesses, he explained that the criminological research reveals that crime is generated by the general commercial activity associated with an adult business, and not the sexually explicit nature of the inventory. Hearing Transcript at 94. That is, "predatory criminals" are attracted to the patrons of adult entertainment businesses, who represent "soft targets" for criminal activity because they are typically persons from out of town, who carry sizeable amounts of cash and, if victimized, fail to report it to the police. Id. At 100.

The City has established through this evidence the first prong of the Renton test for the following reasons. First, the Ordinance states that its purpose is to prevent a wide variety of harms that sociological and criminological studies tend to demonstrate are associated with sexually oriented businesses. One such harm is criminal activity in neighborhoods surrounding such businesses. Thus, the secondary effect the City seeks to remedy is certainly important enough to be considered a substantial government interest under Renton's time, place and manner test. Second, the studies relied upon by the City in enacting the Ordinance are relevant to the problem of regulating secondary effects, such as crime. The Plaintiff's rebuttal evidence, however substantial and

credible, does not rise to the level of casting "direct doubt" on the City's rationale for the Ordinance. Under the Alameda Books[15] test, DVD neither demonstrates that the City's evidence does not support its rationale nor does it dispute the factual findings of the many studies relied upon by the City. The Seventh Circuit has upheld the use of studies and factual conclusions from other towns and places, regardless how remote in time and place they are from the locale at issue, as evidence of a reasonable basis for enacting an ordinance. See, e.g., G.M. Enter., Inc. V. Town of St. Joseph, Wis., 350 F.3d 631, 640 (7th Cir. 2003); R.V.S., L.L.C. v. City of Rockford, 351 F.3d 402, 412 (7th Cir. 2004); Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003).[16] After all, says the Supreme Court, "as a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." Alameda Books, 535 U.S. at 451.

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[15] "This is not to say that a municipality can get away with shoddy data or reasoning The municipality's evidence must fairly support its rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the Renton standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance. City of Los Angeles v. Alameda Books, Inc., 535 U.S 425, 438 (2002) (plurality opinion).

2. Narrowly Tailored Restrictions and Alternative Channels of Communication.

Our analysis does not end here, however. For the Ordinance to be a lawful time, place and manner regulation of sexually oriented businesses, the Renton test further requires that the provisions of the Ordinance must be narrowly tailored to prevent the harms featured in the secondary effects studies. The "narrowly tailored" test is an effort to ensure that, given a genuine nexus between the purpose of an Ordinance that regulates First Amendment speech and the Ordinance itself, the law not be broader than necessary to achieve the City's goal.

Having concluded that the City has expressed a specific and articulable concern it seeks to address (ambient criminal activity, for the most part) by enacting a time, place and manner regulation, we move to consider whether the location restrictions in Section 3(a) are sufficiently narrowly tailored to advance the City's interest without burdening substantially more speech than is necessary. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). See also, Alameda Books, 535 U.S. at 445 (Kennedy, J., concurring) (explaining that "[a] zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech). A measure of the burden on protected speech is whether alternative channels of communication exist in the community affected by the regulation.[17]

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[17] In conducting this analysis, we have well in mind that the Seventh Circuit has also stated that "[n]arrow tailoring" does not

Our November 2004 evidentiary hearing focused on the City's substantial government interest in addressing the potential for increased criminal activity in the immediate vicinity of adult entertainment businesses. To this end, the City's expert discussed the increased likelihood of attracting criminals who prey on the clientele, as discussed above. Dr. McCleary also expressed concern for the plaintiff's "privacy fence," for example, explaining that patrolling police officers could not adequately protect DVD's patrons because the tall, front fence would interfere with their line of sight. Significantly, this crime risk is not addressed by the Ordinance, which has no provision disallowing fences or other line-of-sight obstructions. Similarly, ostensibly to prevent criminal activity in neighborhoods, the Ordinance broadly restricts adult businesses from locating near dwellings, but not specifically *occupied* dwellings, which would clearly be a more narrowly tailored restriction. Further, rather than impose a wholesale ban on adult bookstores located near houses of worship, the Ordinance would better satisfy the "narrowly tailored" requirement if it were to restrict the bookstores' hours of operation to exclude Sundays or such other times when the nearby religious establishments are frequented by worshipers.

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require the restrictions to be the least restrictive means of serving [the city's] content-neutral interests. Pleasureland Museum, Inc. v. Beutter, 288 F 3d 988, 1002 (7th 2002) (upholding some subportions of a sexually oriented businesses ordinance as narrowly tailored while finding that another subportion was broader than necessary to achieve the city's goals of combating adverse secondary effects)

We reference these more narrowly tailored restrictions for the reason that if the city is concerned with limiting criminal activity as an adverse secondary effect of adult businesses, and chooses to deal with the problem through zoning restrictions, then it must draw those regulations sufficiently narrowly to address the feared harm but without burdening unduly the protected activity.

As it currently stands, these restrictions apply to the only existing adult bookstore in New Albany, which obviously means that the constitutionally protected speech will be substantially burdened since there are no alternative channels for the sale and rental of adult materials by an avowedly adult entertainment business. The City argues that "the fact that some pornography is sold in convenience stores and small rooms in video stores simply proves that the City has not engaged in content-based censorship of pornography."[18] Def.'s Post-Hearing Br. at 4. This argument strikes us as patently disingenuous; after all, we are applying the Renton standard to a time, place and manner ordinance specifically aimed at the adult entertainment business; thus, the only acceptable alternative avenue for the

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[18] The City refers to the Dairy Mart convenience store located in the same neighborhood as DVD, about which we heard testimony in the first evidentiary hearing, and the mainstream video stores J & J and Movie Gallery, about which we heard testimony in November. See Caroline Embry Affidavit, Docket #84, Attachment #1.

sale or rental of the adult materials is another actual adult bookstore.[19]

We are of the view that DVD has demonstrated a likelihood of prevailing on the merits of its claim by proving that the location restrictions in the Ordinance are not narrowly tailored to meet the City's interests without burdening substantially more speech than is necessary. Thus, we shall grant the motion to enjoin the enforcement of the Ordinance on this basis.

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[19] In addition, when this litigation commenced, the only legislation addressing a retail store such as DVD was Resolution R-04-10, a six month moratorium on the opening and operation of sexually oriented businesses. The moratorium stated, in pertinent part:

> "The City Council hereby institutes a moratorium to temporarily prohibit such business from opening or locating in the City of New Albany This moratorium will take effect immediately ... This Resolution is Approved and Adopted this 19th day of February 2004. ... Be it Further Resolved that: the New Albany City Plan Commission and its Executive Director, Zoning Officer and other staff is further directed to withhold any and all Occupancy Permits and/or Improvement Location Permits for said business(es) from February 20, 2004, to July 20, 2004."

While it is not impossible to operate an adult bookstore in New Albany that conforms to the Ordinance, it is certainly true that the effect of Resolution R-04-10, superseded by Ordinance G-04-10, was and is to have banned DVD - the only adult entertainment business in town - from operation.

B. The Applicability of the Amortization Provision of the Ordinance to Plaintiff.

The Ordinance makes allowance for an existing non-conforming adult entertainment business to continue to operate for two years in order to recoup its economic investment in that location. The provision reads, in pertinent part:

> A pre-existing "Sexually Oriented Business," lawfully existing in all respects prior to the effective date of this ordinance, may continue to operate for two (2) years following that date in order to make a reasonable recoupment of its investment in its current location.

Ordinance G-04-10, Section 4(A).

The only question for the court to resolve is whether Plaintiff is likely to succeed in demonstrating that it is a legally pre-existing business prior to adoption of the Ordinance. The City argues that DVD never obtained an ILP from the zoning department, despite its being on notice that a change in use required such an application, and thus its abbreviated opening on February 19, 2004, was illegal and does not entitle it to "grandfathering" rights. Def.'s Br. in Opp'n at 20.

From the facts recited *supra* and as adduced at the May 5, 2004, evidentiary hearing, the following is known: (1) Plaintiff's application for a building permit to remodel an existing structure was submitted with blueprints on December 23, 2004, and approved a week later; (2) the permit authorized the remodeling of a "retail business in a commercial zone"; (3) Plaintiff

verified that 601 W. Main Street was properly zoned for a retail business; (4) a form signed by then-Building Commissioner Gary House showed both the present and proposed use of the premises to be "commercial"; (4) the final inspection was scheduled for February 19, 2004, but did not take place at the discretion of the zoning department; (5) prior to February 19, 2004, Plaintiff did not apply for an ILP under § 156.41, requiring such when a "building or structure is changed in use"[20]; (6) at the direction of this court, Plaintiff applied for an ILP on May 14, 2004, was rejected, resolved the miscellaneous safety issues, submitted an amended application, and was again rejected on the basis of the intervening enactment of the Ordinance at issue in this litigation.

This evidence demonstrates Plaintiff's substantial compliance with the building and zoning regulations at the time it was slated to open for business. The resolution of the miscellaneous safety issues effectively eliminated any obstacle to receiving an ILP and, we presume, a final inspection and Certificate of Occupancy. In addition, at the time Plaintiff applied for and received a remodeling permit (December 2003), the use it contemplated - retail adult materials - was conforming. Thus, the Ordinance could not be applied retroactively to defeat the ILP. See Bd. of Zoning Appeals of City of Fort Wayne, 329 N.E. 2d 636, 642 (Ind. App. 1975). Nor could the moratorium, once repealed, create the reason for treating DVD as a non-conforming use. See, e.g. Sagamore Park v. City of Indianapolis, 885 F. Supp. 1146, 1150 -1151 (S. D. Ind. 1994) (Barker, C.J.) (finding that a permit to

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[20] Docket #19, Scott Wood Aff. ¶¶ 4-7.

construct a horse betting facility after moratorium was placed on such facilities was void, and such voiding entitled the plaintiff to have its ILP application reviewed in light of the valid enforceable ordinances in effect on the date of the application).

Given this evidence, we are of the view that Plaintiff qualifies as a pre-existing business which was in substantial compliance with the City's regulations prior to the enactment of the Ordinance. Thus, the amortization provision of the Ordinance would likely apply to Plaintiff.

For the reasons stated above, the Plaintiff has made a showing of likelihood of success of the merits of its claim in this respect as well. Therefore, Plaintiff's Second Motion for Preliminary Injunction should be granted.

Conclusion

Plaintiff has sought a preliminary injunction against the City of New Albany, asking the Court to enjoin the enforcement of its adult entertainment ordinance, No. G-04-10, as to DVD. For the reasons set forth above, we find that the requirements of a preliminary injunction have been met and therefore GRANT Plaintiff's Motion for Injunctive Relief.

It is so ORDERED this 3rd day of January 2005.

/s/
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-1926

[Dated September 3, 2009]

ANNEX BOOKS, INC., *et al.*,
Plaintiffs-Appellants,

v.

CITY OF INDIANAPOLIS, INDIANA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 03-CV-00918 SEB VSS—**Sarah Evans Barker**, *Judge*.

ARGUED SEPTEMBER 8, 2005—
DECIDED SEPTEMBER 3, 2009

Before EASTERBROOK, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Indianapolis revised its adult-business ordinances in 2003. These amendments expanded the definition of "adult entertainment

business" to include any retail outlet that devotes 25% or more of its space or inventory to, or obtains at least 25% of its revenue from, adult books, magazines, films, and devices. (Adult "devices" include vibrators, dildos, and body-piercing implements.) See Indianapolis Rev. Code §807-103. Until 2003 the trigger had been 50%. Any "adult entertainment business" needs a license, must be well lit and sanitary, and may not be open on Sunday or between midnight and 10 a.m. on any other day. Indianapolis Rev. Code §§ 807-202(a), -301(f), -302.

Four firms defined as "adult entertainment businesses" under the revised ordinance filed this suit, contending that the law violates the first and fourth amendments, applied to the states by the fourteenth. The district court enjoined one portion of the amended ordinance and held that plaintiffs are entitled to notice of inspections. 333 F. Supp. 2d 773, 787–89 (S.D. Ind. 2004). Indianapolis has not appealed from that portion of the decision. The district court rejected plaintiffs' argument that the procedures for the issuance and judicial review of licenses permit the City to take too long, or afford it too much discretion. *Id.* at 778–83. Plaintiffs contest that portion of the decision, but it is supported by *Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Indianapolis gives businesses provisional licenses while judicial review proceeds, Rev. Code §807-207(c), so its ordinance is easier to defend than the one sustained in *Littleton*. See *Andy's Restaurant & Lounge, Inc. v. Gary*, 466 F.3d 550, 556 (7th Cir. 2006). We have nothing else to add to this portion of the district court's thoughtful opinion.

That leaves plaintiffs' challenge to the definition of "adult entertainment business" and the imposition of any limits on these firms, other than whatever rules apply to bookstores and video-rental outlets in general. Indianapolis justifies its restrictions on the ground that they reduce crime and other secondary effects associated with adult businesses. See *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Although the restrictions are not as extensive as those at issue in *Alameda Books* and *Playtime Theatres*—the City does not, for example, limit the number of adult establishments by prescribing a 1,000-foot buffer zone around each, or require them to locate in industrial zones far from pedestrian traffic—the City nonetheless concedes that its laws are subject to "intermediate" scrutiny because plaintiffs sell books. This means that, to prevail, the City needs evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech.

The sort of evidence that the Justices deemed sufficient in *Alameda Books* and *Playtime Theatres* showed that crime is higher in city blocks (or census tracts) in which adult establishments are located. That could be because real estate is cheaper in high-crime areas, and that sleazy establishments tend to congregate in low-rent districts. But the fact that crime rose as adult establishments entered the area (see 535 U.S. at 435 (describing the study)) implied that the causal arrow ran from adult businesses to crime, rather than the other way. That could happen because adult establishments attract a particular kind of clientele that is emboldened by association with like-minded people, so that prostitution and public masturbation (for example) are more acceptable near

a congeries of sexually oriented businesses than they would be elsewhere. Justice Kennedy put it this way in *Alameda Books*:

> We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation—a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to speech whatsoever, and both the city and the speaker will have their interests well served.

535 U.S. at 452–53 (Kennedy, J., concurring in the judgment).

Indianapolis relies on this line of argument, as well as on a study it conducted in 1984, before adopting the original version of the challenged ordinance. This study found higher crime rates near businesses that

were defined as "adult". But here the City encounters problems, for the studies on which it relies—like Justice Kennedy's hypothetical—deal with ordinances dispersing adult businesses. The 2003 revision does not require dispersal. Instead it closes all businesses after midnight and on Sundays, and requires bright interior lights when the businesses are open. None of the studies on which the City relied before enacting the law, and none introduced in this record, concerns that kind of ordinance. Nor do the studies show that an increase in adult businesses' operating hours is associated with more crime; the studies are simple cross-sectional analyses that leave causation up in the air. (In other words, they may show no more than that adult businesses prefer high-crime districts where rents are lower.)

More importantly, the studies to which the City points concern adult businesses that offer live sex shows, private viewing booths, or both. This circuit's decisions likewise concern live entertainment. See, e.g., *R.V.S., L.L.C. v. Rockford*, 361 F.3d 402 (7th Cir. 2004) (exotic-dancing nightclubs); *G.M. Enterprises, Inc. v. St. Joseph*, 350 F.3d 631 (7th Cir. 2003) (nude dancing in bars). Three of the four plaintiffs in this suit, however, do not offer live entertainment or private viewing. They are simple book or video outlets, brought under the regulatory umbrella only because 25% or more of their sales come from sex-related materials. Until the 2003 amendments, these stores were treated the same as Barnes & Noble or Blockbuster Video. If they were associated with significant crime or disorderly conduct, it should be easy for Indianapolis to show it. But the City has not offered an iota of evidence to that effect.

The City's only evidence about the four plaintiffs is that during 2002 the police made 41 arrests for public masturbation at Annex Books, the only plaintiff that offers private booths. (The masturbation was "public" in the sense that officers could see what customers were doing inside the booths.) The district court thought this datum enough, by itself, to support the 2003 amendments. Yet it is hard to grasp how misdemeanors committed in single-person booths justify the regulation of book and video retailers that lack such booths.

Indeed, we do not know when the arrests occurred. Unless most of them were after midnight, or on Sunday, they don't justify the ordinance even with respect to establishments that supply entertainment on the premises. Nor can we tell whether 41 arrests at one business over the course of 365 days is a large or a small number. How does it compare with arrests for drunkenness or public urination in or near taverns, which in Indianapolis can be open on Sunday and well after midnight? If there is more misconduct at a bar than at an adult emporium, how would that justify greater legal restrictions on the bookstore—much of whose stock in trade is constitutionally protected in a way that beer and liquor are not.

Indianapolis has approached this case by assuming that any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city. That might be so if the rational-relation test governed, for then all a court need do is ask whether a sound justification of a law may be imagined. See, e.g., *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). But

because books (even of the "adult" variety) have a constitutional status different from granola and wine, and laws requiring the closure of bookstores at night and on Sunday are likely to curtail sales, the public benefits of the restrictions must be established by evidence, and not just asserted. The evidence need not be local; Indianapolis is entitled to rely on findings from Milwaukee or Memphis (provided that a suitable effort is made to control for other variables). See *Andy's Restaurant*, 466 F.3d at 554–55. But there must be *evidence*; lawyers' talk is insufficient.

Alameda Books establishes that much. Four Justices would have ruled for the plaintiff, without need for a trial, even though the empirical support for the Los Angeles ordinance was materially stronger than the data that Indianapolis proffers. 535 U.S. at 453–66 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). (The Los Angeles study was stronger because it implied causation and not just correlation.) The other five Justices concluded that a hearing was necessary to determine whether the evidence that Los Angeles offered was strong enough. *None* of the Justices thought that summary judgment could be granted in the municipality's favor when the strength of, and appropriate inferences from, the studies were contested. (Well, "none" is an overstatement. Justice Scalia concluded that pandering may be prohibited without any need for evidence. 535 U.S. at 443–44 (concurring opinion). But Indianapolis does not defend its ordinance on that basis.) Justice O'Connor's plurality opinion (joined by Chief Justice Rehnquist and Justices Scalia and Thomas) was explicit (535 U.S. at 438–39):

> [A] municipality [cannot] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in [*Playtime Theatres*]. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Instead of adducing data to support the regulation of bookstores that do not furnish on-site viewing, Indianapolis is content to belittle plaintiffs' evidence. Plaintiffs offered a study by Daniel Linz, a professor at the University of California, Santa Barbara. Linz first examined the relation between crime and adult establishments in Indianapolis, using different units than the City had done. He found little relation—and he added a time series, while the City relied on a cross-section. In other words, Linz conducted the same kind of analysis as the Los Angeles study in *Alameda Books*, asking whether crime went up in a given area when new adult establishments opened, or down when they closed. Linz concluded that these openings and closings did not materially affect crime. Linz also critiqued the methodology of studies conducted by Indianapolis and other cities.

One may doubt that Linz's work is the last word; a multivariate regression would provide a better

foundation than either a time series or a geographic cross-section. See Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, Reference Manual on Scientific Evidence (2d ed.) (Federal Judicial Center 2000). Linz also disregards some sex-linked crimes, such as exposure and prostitution. That's like studying the effects of taverns while ignoring arrests for drunk driving. (Linz does consider arrests for rape and child molestation, however.) But the City, which offered only the simple cross-section, is in no position to complain. Instead the City observed that Linz compared differences between 2001 and 2003, ignoring 2002, which (apparently) was a peak year for arrests in Annex Books. Yet the City did not apply Linz's methods to the time series 2001, 2002, 2003 to see whether the omission mattered; instead it just asserted that the choice of years automatically invalidated the study, which is not a sound conclusion.

Instead of adducing a serious critique of Linz's work, or tackling the subject directly (Linz's data and methods were disclosed in his study), the City asserts that the federal judiciary has already decided that all of Linz's work must be ignored. It contends that, in *G.M. Enterprise*, 350 F.3d at 640, we called Linz's methods "completely unfounded." Not at all. What we called "completely unfounded" was counsel's assertion that a city's justifications have to satisfy the *Daubert* standard for expert testimony. (See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).) Linz had observed that some studies offered in that case were not "reliable," as Fed. R. Evid. 702 uses that word. We thought that *Alameda Books* allows municipalities to take all kinds of evidence into account; this differs from saying that nothing Linz writes may be credited.

Counsel for Indianapolis conceded at oral argument that none of the studies that the City has offered in defense of its ordinance deals with the secondary effects of stores that lack private booths. Nor do the studies assess the effects of stores that sell as little as 25% adult products. These shortcomings, plus Linz's work, call the City's justifications into question and require an evidentiary hearing at which the City must support its ordinance under the intermediate standard of *Alameda Books*. See also *Abilene Retail #30, Inc. v. Dickinson County*, 492 F.3d 1164 (10th Cir. 2007) (reaching the same conclusion on a similar record). The Supreme Court decided *Playtime Theatres* more than 30 years ago, and since then adult-entertainment ordinances have become common. There must be some pertinent data to be gathered, if not in Indianapolis then elsewhere. (Some can be found in a bibliography at http://www.secondaryeffectsresearch.com.) But if, as is possible, there is simply no sound basis for a conclusion that book or video stores (without live entertainment or private booths) open after midnight, or on Sunday, cause adverse secondary effects, then Indianapolis must revert to its pre-2003 system of regulation.

We are conscious that "hold an evidentiary hearing and apply intermediate scrutiny" is not very helpful to the district judge, or for that matter the lawyers. It is possible to be a little more concrete, however, thanks to Justice Kennedy's opinion in *Alameda Books*. Because the other Justices divided 4 to 4, and Justice Kennedy was in the middle, his views establish the holding. See *Marks v. United States*, 430 U.S. 188 (1977). He concluded that a regulation of adult bookstores "can be consistent with the First Amendment if it is likely to cause a significant

decrease in secondary effects and a trivial decrease in the quantity of speech." 535 U.S. at 445 (concurring opinion). "[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. . . . A city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. Justice Kennedy insisted that the benefits (less crime) be compared with the detriments (less speech) and added that a given regulatory system is easier to justify if it works in the same way as the regulation of other, similar, businesses, for then it is harder to conclude that the government has set out to curtail speech because of its subject matter. *Id.* at 447–49.

These thoughts should give some structure to the hearing on remand—though we recognize that, because crime and speech cannot be reduced to a common metric, a direct comparison (how much speech should be sacrificed to achieve how much reduction in crime?) is difficult if not impossible. Here it matters that both Justice O'Connor's opinion for the plurality, and Justice Kennedy's concurrence, conclude that municipalities should get the benefit of the doubt. Principles of federalism support experimentation, and one aspect of freedom is the power to be different. The standards of Manhattan, New York, need not be followed in Manhattan, Kansas. See 535 U.S. at 439 (plurality opinion), 451 (Kennedy, J., concurring). See also *Illinois One News, Inc. v. Marshall*, 477 F.3d 461 (7th Cir. 2007) (ability of a small town's residents to obtain adult materials outside its borders may show that no material curtailment of expression has

occurred). Cf. *National Rifle Association of America, Inc. v. Chicago*, 567 F.3d 856, 860 (7th Cir. 2009).

The parties have pressed on us dozens of precedents, from this circuit and elsewhere, that do more to show the problems of interpretation and application created by the fractured decision in *Alameda Books* than to establish any concrete legal rule. Few of these decisions offer much guidance, either to us or to the district court on remand, because few deal with hours-of-operation rules applicable to businesses that do not offer on-site viewing. It is accordingly unnecessary for us to canvass the dozens of appellate decisions that have struggled to understand and apply *Alameda Books*. For example, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), and *Richland Bookmart, Inc. v. Knox County*, 555 F.3d 512 (6th Cir. 2009), both sustained regulations applicable to book and video stores, but only after concluding that the plaintiffs had not undermined the justifications for the laws.[†] We

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[†] *Richland Bookmart* and *H&A Land Corp. v. Kennedale*, 480 F.3d 336, 339 (5th Cir. 2007), treated the study that Indianapolis conducted in 1984 as supporting a conclusion that stores selling adult books and videos create adverse secondary effects. Yet Indianapolis does not deem its own study to support that conclusion, and our review of the 1984 study confirms the City's understanding The 1984 study does not differentiate by type of adult business The City did poll brokers to learn whether they thought that "adult bookstores" would depress real estate prices (most answered yes), but the study did not *define* "adult bookstore." Who knows whether brokers envisaged on-premises entertainment, or whether they thought that 25% of sales makes an establishment "adult"? An opinion poll differs from a concrete result. (The 1984 study did not limit the survey to brokers who had experience buying or selling adult establishments, or in places

refrain from a survey, which would lengthen this opinion without edifying the reader.

But one of these decisions, in addition to *Abilene Retail* (cited above), offers a little assistance. San Antonio adopted a dispersal rule (1,000 feet between adult businesses) that applied to a set of outlets defined to include stores that did nothing but sell books, tapes, and DVDs, which customers could not watch on premises. The fifth circuit held in *Encore Videos, Inc. v. San Antonio*, 330 F.3d 288 (5th Cir. 2003), that this ordinance violated the first amendment, because San Antonio had not offered any evidence that adult video stores lacking facilities for on-premises viewing create the same secondary effects as other establishments. If Indianapolis cannot produce such evidence, satisfying Justice Kennedy's cost-benefit standard, its ordinance must meet the same fate as San Antonio's.

The judgment is affirmed to the extent that it sustained the licensing procedures but is reversed to the extent it concerns the coverage and substantive requirements, and the case is remanded for an evidentiary hearing consistent with this opinion.

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near those establishments.) The authors inquired whether real estate prices are lower near adult businesses, but that part of the study lumps all adult establishments together, it does not distinguish between bookstores and topless bars or peep shows. This part of the study does contain a perfunctory time series analysis, however, in an attempt to inquire whether adult businesses seek out, rather than cause, low prices. It concludes that prices appreciate less in parts of the City where adult businesses congregate. See *Adult Entertainment Businesses in Indianapolis: An Analysis* 30–31 (1984).

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 05-1286

October 26, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

KENNETH F. RIPPLE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

NEW ALBANY DVD, LLC , *Plaintiff-Appellee,*	)
v.	)
CITY OF NEW ALBANY, INDIANA, *Defendant-Appellant.*	)

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

No. 4:04-cv-00052-SEB-WGH
Sarah Evans Barker, *Judge*.

Order

Defendant-appellant filed a petition for rehearing and rehearing en banc on October 8, 2009. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Circuit Judge Tinder did not participate in the consideration of this petition.

APPENDIX E

Bill No. G-04-03 **Ordinance No. G-04-10**

AN ORDINANCE REGULATING SEXUALLY ORIENTED BUSINESSES

WHEREAS, the U.S. Supreme Court has distinguished sexually oriented products and services that are not expressive and not protected by the First Amendment, *see Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *dismissed for want of a substantial federal question*, 435 U.S. 982 (1978) (obscene devices), and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (escort services and sexual encounter services), from those that presumptively are, *see Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (films), *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (same);

WHEREAS, the United States Supreme Court has repeatedly upheld restrictive zoning of sexually oriented businesses, even those that are classified by virtue of dealing in material presumptively protected by the First Amendment, and has recognized that local governments have substantial interests in regulating the location of said businesses, see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); and

WHEREAS, there is documented evidence that sexually oriented businesses are inappropriate land uses for certain areas of the community, and have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, and are often associated with secondary effects including crime, blight, litter, and the downgrading of property values; and

WHEREAS, the Common Council has determined that sexually oriented businesses within the limits of the City require supervision from local public safety and health agencies in order to protect and preserve the health, safety and welfare of the patrons of businesses as well as the citizens of the City of New Albany; and

WHEREAS, the Indiana Home Rule Statute permits municipalities to adopt ordinances to protect the health, welfare and safety of the municipalities residents and to preserve the peace, order and safety of its community; and

WHEREAS, the authority for and findings within this ordinance are based on the City's general police power, the Indiana Home Rule Statute permitting municipalities to adopt ordinances to protect the health, welfare and safety of the municipalities residents and to preserve the peace, order and safety of its community, as well as on the evidence of the adverse secondary effects of sexually oriented businesses which is within the common knowledge of municipalities and is widely reported in judicial opinions, media reports, land use studies, and crime impact reports made available to the Common Council, several of which are set forth herein. Additionally, the

Common Council relies upon repeated judicial findings of municipalities' reasonable reliance on this body of secondary effects evidence to support time, place, and manner regulations of sexually oriented businesses. The Common Council relies upon and incorporates the findings of secondary effects discussed in the following non-exhaustive list of cases: *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 426 U.S. 50 (1976); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *dismissed for want of a substantial federal question*, 435 U.S. 982 (1978); *Schultz v. City of Cumberland*, 26 F.Supp.2d 1128 (W.D. Wisc. 1998), *aff'd in part, rev'd in* part, 228 F.3d 831 (7th Cir. 2000); *Blue Canary Corp. v. City of Milwaukee*, 270 F.3d 1156 (7th Cir. 2001); *Matney v. County of Kenosha*, 86 F.3d 692 (7th Cir. 1996); *Berg v. Health & Hospital Corp.*, 865 F.2d 797 (1989); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (1999); *Graff v. City of Chicago*, 9 F.3d 1309 (1993); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (1996); *Chulchian v. City of Indianapolis*, 633 F.2d 27 (7th Cir. 1980); *Bigg Wolf Discount Video v. Montgomery County*, 256 F. Supp. 2d 385 (D. Md. 2003); *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143 (E.D. Wash. 2002) (including exhibits cited therein); *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill. 2d 123 (1988) (including cases cited therein); and other cases; and on reports of secondary effects occurring in and around adult uses, including, but not limited to, Garden Grove, California - 1991; Los Angeles, California - 1977; Whittier, California - 1978; Austin, Texas - 1986; Phoenix,

Arizona – 1979, 1995-1998; Minneapolis, Minnesota-1980; Houston, Texas - 1997; Indianapolis, Indiana – 1984; Amarillo, Texas; Seattle, Washington - 1989; Oklahoma City, Oklahoma - 1986; and Dallas, Texas - 1997; St. Croix County, Wisconsin - 1993; Bellevue, Washington, - 1998; Newport News, Virginia - 1996; New York Times Square study - 1994; and also on findings from the Report of the Attorney General's Working Group On The Regulation Of Adult uses, (June 6, 1989, State of Minnesota).

NOW, THEREFORE, BE IT ORDAINED by the Common Council of the City of New Albany, Indiana, as follows:

SEXUALLY ORIENTED BUSINESS ORDINANCE

Section 1. Purpose and Findings.

(A) Purpose. It is the purpose of this ordinance to regulate sexual oriented businesses in order to promote the health, safety, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of adult uses within the City. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment or Article I, § 9 of the Indiana Constitution, or to deny access by the distributors and exhibitors of sexually

oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.

(B) Findings. "Sexually Oriented Businesses," as defined herein, should be regulated and should be segregated from one another and from houses of worship, schools, parks, and residential neighborhoods to protect the public health, welfare, and safety because, *inter alia*, sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, illicit and unsanitary sexual activity, illicit drug use, decreased desirability of and negative impacts on the use of surrounding properties, blight, litter, and sexual assault and exploitation. The City has a substantial government interest in preventing each of the aforementioned adverse effects.

Section 2. Definitions.

The following definitions apply to this Section of the New Albany Code:

(A) "Establish or Establishment" shall mean and include any of the following:

(1) The opening or commencement of any Sexually Oriented Business as a new business; or

(2) The conversion of an existing business, whether or not a "Sexually Oriented

Business," to any "Sexually Oriented Business."

(B) "Nudity or a State of Nudity" means the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

(C) "Operate or Cause to Operate" shall mean to cause to function or to put or keep in a state of doing business. "Operator" means any persons on the premises of a Sexually Oriented Business who is authorized to exercise overall operational control of the business or who causes to function or who puts or keeps in operation the business. A person may be found to be operating or causing to be operated a Sexually Oriented Business whether or not that person is an owner or part owner of the business.

(D) "Person" shall mean individual, proprietorship, partnership, corporation, association, or other legal entity.

(E) "Regularly Features" means the consistent and repeated offering of the identified goods or services to the public as one of the intended profit-making objectives of the commercial enterprise, which enterprise regularly holds itself forth to the public as a place where said goods or services may be obtained.

(F) "Semi-Nude or State of Semi-Nudity" shall mean a state of dress in which opaque clothing

covers no more than the genitals, anus, anal cleft or cleavage, pubic area, vulva, and nipple and areola of the female breast, as well as portions of the body covered by supporting straps or devices. This definition shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided that the areola and nipple are not exposed in whole or in part.

(G) "Sexual Device" means any three (3) dimensional object designed and marketed for stimulation of the male or female human genital organ or anus or for sadomasochistic use or abuse of oneself or others and shall include devices such as dildos, vibrators, and penis pumps, and shall also include other devices with non-sex related utility, such as leather whips, straps, and ligatures when said devices are marketed in a context suggesting sexual or sadomasochistic purposes. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

(H) "Sexually Oriented Business" means and includes those businesses defined as follows:

(1) "Adult Bookstore" or "Adult Video Store" means a commercial establishment that has a "significant or substantial" percent of its stock-in-trade or derives a "significant or substantial" percent of its revenue or devotes a "significant or substantial" portion of its interior business or advertising to the sale or rental, for any form of consideration, of any one of the following: books,

magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the display of "specified sexual activities" or "specified anatomical areas."

(2) "Adult Theater" means an establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions for viewing by persons which are characterized by the display of "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration. This definition shall include businesses which regularly feature view booths or rooms of less than one hundred fifty (150) square feet wherein such films are regularly shown.

(3) "Sexual Device Shop" means a commercial establishment that regularly features sexual devices. Nothing in this definition shall be construed to include any pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services.

(I) "Specified Anatomical Areas:" means and includes any of the following:

(1) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areola; or

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(J) "Specified Sexual Activities:" means and includes any of the following:

(1) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts:

(2) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(3) Masturbation, actual or simulated; or

(4) Excretory functions as part of or in connection with any of the activities set forth in subdivisions (1) through (3) of this subsection.

(K) "House of Worship" means any church, synagogue, mosque, temple, or building which is used primarily for religious worship and related religious activities.

(L) "School" means any nursery school; daycare facilities; preschools; kindergarten schools; public or private elementary, middle or secondary schools; special education schools; vocational schools, junior colleges or colleges and universities. School includes all school grounds.

(M) "Park" means any park used or designated as an area for recreational activities, including but not limited to playgrounds, nature trials,

swimming pools, athletic fields, basketball, baseball, tennis courts, walking paths or similar public land within the City of New Albany.

(N) "Permittee" means a person whose name appears on the permit/application to operate a Sexually Oriented Business.

(O) "Significant or Substantial" means thirty (30%) percent or more.

(P) "Residence" means any structure used by one or more persons as a dwelling.

Section 3. Sexually Oriented Businesses Permitted, Subject to Certain Objective Criteria in Order to Promote the Purpose and Findings of this Ordinance.

(A) It shall be considered a nuisance and a violation for any "person" to establish, operate, or cause to be operated a Sexually Oriented Businesses in the City of New Albany, unless said Sexually Oriented Business:

(1) 1000 feet from any other Sexually Oriented Business; or

(2) 1000 feet from any house of worship, park, or school; or

(3) 1000 feet from any structure used as a residence.

(B) For the purpose of this section, measurements shall be made in a straight line in

all directions without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a Sexually Oriented Business is or is to be established.

(C) This ordinance does not amend or supercede or revoke the City of New Albany's Live Entertainment Ordinance § 120 et al. or Massage Parlor Ordinance § 116 et al.

Section 4. Preexisting Sexually Oriented Businesses.

(A) A pre-existing "Sexually Oriented Business," lawfully existing in all respects prior to the effective date of this ordinance, may continue to operate for two (2) years following that date in order to make a reasonable recoupment of its investment in its current location. At the conclusion of said two (2) years, the Sexually Oriented Business shall no longer be recognized as a legal pre-existing Sexually Oriented Business, provided that a pre-existing Sexually Oriented Business may apply for one or more six-month extensions of the original two-year period upon a showing financial hardship. An application for an initial extension based upon financial hardship ("hardship exception") shall be made at least sixty (60) days before the conclusion of the aforementioned two-year (2-yr.) period. If a hardship extension is granted, subsequent applications for hardship extensions shall be made at least sixty (60) days before the conclusion of the pre-existing use's current extension period.

(B) Procedure for seeking hardship extension. An application for a hardship extension shall be filed in writing with the New Albany Board of Public Works and Safety, and shall include evidence of purchase and improvement costs, income earned and lost, depreciation, and costs of relocation. Within ten (10) days after receiving the application, the Zoning Officer shall schedule a public hearing on the application before the New Albany Planning and Zoning Commission, which public hearing shall be conducted within thirty (30) days after the Zoning Officer's receipt of the application. Notice of the time and place of such public hearing shall be published at least ten (10) days before the hearing in a newspaper of general circulation published within the city, and shall contain the particular location for which the hardship extension is requested.

(C) The New Albany Planning and Zoning Commission shall issue a written decision within ten (10) days after the public hearing on the application for a hardship extension. The hardship extension shall be granted upon a showing that the nonconforming Sexually Oriented Business is unable to recoup its investments, made prior to the effective date of this ordinance, in its current location unless the hardship extension is granted.

Section 5. Permit Required.

(A) No "person" shall maintain, operate, conduct, or cause to be conducted, any Sexually Oriented Business within the limits of the City of New Albany without first obtaining a permit under this Section.

(B) An applicant for a Sexually Oriented Business permit shall file with the City Controller a completed application made on a form prescribed and provided by the City Controller. An application shall be considered complete if it includes the information required in this Section. The applicant shall be qualified according to the provisions of this Ordinance. The application is complete when it includes the information and items required in subsections (1) and (2) below:

(1) An application for permit must contain the following information:

(a) The full true name of the applicant, and any other names or aliases used in the preceding five (5) years.

(b) The applicant's current business or mailing address.

(c) Proof that the applicant is at least eighteen (18) years of age, consisting of either (i) a copy of the applicant's birth certificate and current photo, or (ii) a copy of the applicant's driver's license with picture, or (iii) another picture identification document issued by a government agency.

(d) The name of the business, the business location and legal description of the property, a description of the type of "Sexually Oriented Business."

(e) A sketch or diagram showing the configuration of the premises, including a

statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared, but shall be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches.

(f) A signed statement stating the following:

(i) That the business is authorized by the State of Indiana to conduct business within the state; and

(ii) That the site being applied for meets the requirements of Section 3 of this Chapter regarding required distances from all residences, houses of worship, parks, schools, and other "Sexually Oriented Businesses," and

(iii) The name and address of the statutory agent or other agent authorized to receive service of process.

(g) If a person wishing to operate a Sexually Oriented Business is an individual, he or she shall sign the application for a permit as applicant. If an entity (partnership, corporation, limited liability company, etc.) or group of individuals seeks to obtain a permit, each individual with twenty (20%) or greater interest must sign as an applicant under oath and provide the information required in this subsection.

(2) The applicant shall be required to pay a non-refundable application fee of two hundred ($200.00) dollars at the time of filing an application for the investigation required by the City in reviewing the application.

(B) The information provided by an applicant in connection with the application for a permit under this Ordinance shall be maintained by the City on a confidential basis, and may be disclosed only: (1) to other governmental agencies in connection with a bona fide law enforcement or public safety function, or (2) as may otherwise be required by law or a court order.

Section 6. Issuance of Permit and Renewal of Permit.

(A) Upon the filing of a completed application for a Sexually Oriented Business permit, the City Controller shall issue a Temporary Permit to the applicant, which Temporary Permit shall expire upon the final administrative decision of the City to deny or grant a permit. Within thirty (30) days after the receipt of a completed application, the City Controller shall either issue a permit or issue a written notice of intent to deny a permit.

(B) The City Controller shall approve the application and grant a Sexually Oriented Business unless one or more of the following is true:

(1) An applicant is less than eighteen (18) years of age;

(2) An applicant has failed to provide information required by Section 5 of this Chapter or has provided false information on the application;

(3) The premises to be used for the Sexually Oriented Business currently are in violation of or are not in compliance with the City's health, fire, or building codes, or the locational requirements of Section 3 of this Chapter;

(4) The applicant failed to pay the non-refundable permit application fee;

(5) The applicant has a permit under this ordinance that has been revoked within the previous year.

(C) The granting of a permit to a permittee for a Sexually Oriented Business shall be for one year and is non-transferable to any other person other than the applicant(s) listed on the application and is valid only for the location listed on the application.

(D) The permittee who has been granted a permit to operate a Sexually Oriented Business who wishes to renew a permit shall file a renewal application of its permit sixty (60) days before the expiration of the issuance date when the original permit was granted and shall follow all conditions of Section 5 of this ordinance. Upon application for renewal the permittee shall pay a one hundred ($100.00) dollar non-refundable fee for the investigation required by the City in reviewing the renewal application.

Section 7. Periodic Inspection.

(A) "Sexually Oriented Businesses" permittees and their employees shall permit officers or agents of the City to inspect, from time to time on an occasional basis, the portions of the "Sexually Oriented Businesses" premises where patrons are permitted, for the purpose of ensuring compliance with the specific regulations of this Chapter, during those times when the sexually oriented business is occupied by patrons or is open for business. This section shall be narrowly construed by the City to authorize reasonable inspections of the permitted premises pursuant to this chapter, but not to authorize a harassing or excessive pattern of inspections.

Section 8. Expiration of Permit.

(A) Each permit shall expire one (1) year from the date of issuance and may be renewed only by making application as provided in Section 5. An application for renewal shall be made at least sixty (60) days before the expiration date, and when made less than thirty (30) days before the expiration date, the expiration of the permit will not be affected.

Section 9. Suspension of Permit.

(A) The City shall issue a written notice of intent to suspend a permit for a period not to exceed thirty (30) days if a permittee has knowingly violated any section of this chapter or has knowingly allowed an employee of the Sexually Oriented Business to violate this chapter. The

issuance of a written notice of intent to suspend shall not be a prerequisite to issuance of a written notice of intent to revoke a permit per Section 10.

Section 10. Revocation of Permit.

(A) The City shall issue a written notice of intent to revoke a Sexually Oriented Business permit if a cause of suspension in Section 9 occurs and the permit has been suspended within the preceding twelve (12) months.

(B) The City shall issue a written notice of intent to revoke a Sexually Oriented Business permit if a permittee:

(1) Provided false information in conjunction with the application for the Sexually Oriented Business Permit.

(2) Allowed possession, use, or sale of controlled substances on the premises.

(3) Allowed prostitution on the premises.

(4) Operated the Sexually Oriented Business during a period of time when the permittee's permit was suspended.

(5) Allowed a any act of sexual intercourse, sodomy, oral copulation, or masturbation to occur in or on the permitted premises.

(C) When, after the notice and hearing procedure described in Section 10, the City revokes a permit, the revocation shall continue for one (1)

year and the permittee shall not be issued a permit for one (1) year from the date the revocation becomes effective, provided that, if the conditions of Section 10 (B) are met, a Provisional Permit will be granted pursuant to that Section.

Section 11. Hearing on Permit Denial, Suspension, Revocation; Appeal.

(A) If facts exist for denial, suspension, or revocation of a permit under this Ordinance, the City Controller shall notify the applicant or permittee (respondent) in writing of the intent to deny, suspend, or revoke the permit, including the grounds therefor, by personal delivery, or by certified mail. The notification shall be directed to the most current business address on file with the City Controller. Within five (5) working days of receipt of such notice, the respondent may provide to the City Controller, in writing, a response that shall include a statement of reasons why the permit or permit should not be denied, suspended, or revoked. Within three (3) days of the receipt of respondent's written response, the Board of Public Works and Safety shall notify respondent in writing of the hearing date on respondent's denial, suspension, or revocation proceeding.

(1) Within ten (10) working days of the receipt of respondent's written response, the Board of Public Works and Safety shall conduct a hearing at which respondent shall have the opportunity to be represented by counsel and present evidence and witnesses on his or her behalf. The Board of Public Works and Safety shall issue a written opinion and decision

within five (5) days of the hearing. If a response is not received by the Board of Public Works and Safety in the time provided or, if after a hearing, the Board of Public Works and Safety finds that grounds as specified in this Ordinance exist for denial, suspension, or revocation, then such denial, suspension, or revocation shall become final five (5) days after the Board of Public Works and Safety sends, by certified mail, written notice that the permit has been denied, suspended, or revoked. Such notice shall include a statement advising the applicant or permittee of the right to appeal such decision to a court of competent jurisdiction.

(2) the Board of Public Works and Safety finds that no grounds exist for denial, suspension, or revocation of a permit, then within five (5) days after the hearing, the Board of Public Works and Safety shall withdraw the intent to deny, suspend, or revoke the permit, and shall so notify the respondent in writing by certified mail of such action and shall contemporaneously issue the permit.

(B) When a decision to deny, suspend, or revoke a permit becomes final, the applicant or permittee (aggrieved party) whose application for a permit has been denied, or whose permit has been suspended or revoked, shall have the right to appeal such action to a court of competent jurisdiction. Upon the filing of any court action to appeal, challenge, restrain, or otherwise enjoin the City's enforcement of the denial, suspension, or revocation, the City shall immediately issue the

aggrieved party a Provisional Permit. The Provisional Permit shall allow the aggrieved party to continue operation of the sexually oriented business or to continue employment as a sexually oriented business employee, as the case may be, and will expire upon the court's entry of a judgment on the aggrieved party's action to appeal, challenge, restrain, or otherwise enjoin the City's enforcement.

Section 12. Minors and Sexually Oriented Businesses.

(A) A person who operates a Sexually Oriented Business shall not allow a person under the age of eighteen (18) years of age to be in or remain upon the business premises.

Section 13. Hours of Operation.

(A) A Sexually Oriented Business shall not be open for business between the hours of 10:00 p.m. and 10:00 a.m. of any particular day.

Section 14. Regulations Pertaining to Exhibition of Sexually Explicit Films or Videos on the Premises.

(A) A person who operates or causes to be operated a Sexually Oriented Business exhibits on the premises, in a viewing room of less than one hundred fifty (150) square feet of floor space, films or videos characterized by an emphasis on "specified sexual activities" or "specified anatomical areas," shall comply with the following requirements:

(1) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. A manager's station shall not be greater than thirty-two (32) square feet in area. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this Subsection must be by direct line of sight from the manager's station.

(2) It shall be the duty of the permittee to ensure that the view area specified in Subsection (A)(1) remains unobstructed by any doors, curtains, partitions, walls, merchandise, display racks, or other materials at all times.

(3) No viewing room or booth may be occupied by more than one (1) person at any time.

(4) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than five (5.0) foot-candles as measured at the floor level.

(5) It shall be the duty of the permittee to ensure that the illumination described above is

maintained at all times that any patron is present in the premises.

(6) No permittee shall allow openings of any kind to exist between viewing rooms or booths.

Section 15. Culpable Mental State Required to Establish Liability.

(A) Where any provision or offense herein fails to state a necessary level of culpability to establish a violation or liability, the offense shall be established upon a showing that the person acted knowingly or recklessly with regard to the predicate act. Notwithstanding anything to the contrary, for the purposes of this chapter, an act by an employee shall be imputed to the Sexually Oriented Business permittee for the purpose of establishing a violation of this chapter, or for purposes of license denial, suspension, or revocation only if a permittee allowed, either knowingly or recklessly, a violation of this chapter to occur. It shall be a defense to liability that the Sexually Oriented Business permittee was powerless to prevent the violation.

Section 16. Failure of Official to Meet Time Frame Not to Risk Applicant or Permittee Rights.

(A) In the event that a government official is required to take an act or do a thing pursuant to this Chapter within a prescribed time, and fails to take such act or do such thing within the time prescribed, said failure shall not prevent the exercise of constitutional rights of an applicant or

permittee. If the act required of the official under this Chapter, but not completed in the time prescribed, includes approval of condition(s) necessary for approval by the City of an applicant or permittee's application for a Sexually Oriented Business permit (including a renewal), the applicant or permittee shall be deemed to have satisfied the condition(s) for which approval was sought.

Section 17. Penalties; Injunction.

(A) A person who violates this Chapter shall be subject to a fine not to exceed two thousand five hundred dollars ($2,500). Each day the violation is committed, or permitted to continue, shall constitute a separate offense and shall be fined as such.

(B) A person who violates this Chapter is subject to a suit for injunction. Nothing in this Section and no action taken thereunder shall be held to exclude or prevent such criminal or other civil proceedings as may be authorized by other state or local law.

Section 18. Severability.

Each section, provision, phrase, and word of this ordinance is hereby declared to be independent and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any portion herein, or the application thereof to any person or circumstance is held to be invalid, the remaining portions and the application of such portions to any person or circumstances other than those to which it is held

invalid, shall not be affected thereby, and it is hereby declared that such portions would have been passed independently of such section or provision so known to be valid.

Section 19. Conflicting Provisions Repealed.

Any provisions in the New Albany City Code in conflict with this ordinance are hereby repealed. Resolution No. R-04-10 is hereby repealed.

SO ORDAINED BY THIS COMMON COUNCIL THIS THE 18 DAY OF March, 2004.

s/ William H Schmidt
WILLIAM H. SCHMIDT, President
New Albany Common Council

ATTEST:

s/ Marcey J. Wisman
CITY CLERK

CERTIFICATE OF PRESENTATION TO MAYOR

The undersigned hereby certifies that the Ordinance set forth herein above was presented by me as the duly elected New Albany City Clerk, or designee, to the Mayor of the City of New Albany this 18 day of March, 2004.

s/ Marcey J. Wisman
City Clerk

APPROVAL BY MAYOR

The ordinance set forth herein above was accepted and approved by me as Mayor of the City of New Albany, Indiana, this 18th day of March, 2004.

s/ James E. Garner, Sr.
James E. Garner, Sr.
Mayor, City of New Albany

ATTEST:

s/ Marcey J. Wisman
CITY CLERK

APPENDIX F

Bill No. Z-04-12 **Ordinance No. Z-04-20**

ORDINANCE
AMENDING THE CODE OF ORDINANCES OF NEW ALBANY, INDIANA PROVIDING FOR THE ZONING OF SEXUALLY ORIENTED BUSINESSES, SPECIFYING DISTRICTS WHERE SUCH USES ARE PERMITTED, AND FURTHER SPECIFYING DEVELOPMENT STANDARDS
TITLE XV CHAPTER 156

WHEREAS, there is documented evidence that sexually oriented businesses are inappropriate land uses for certain areas of the community, and have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, and are often associated with secondary effects including crime, blight, litter, and the downgrading of property values; and

WHEREAS, the United States Supreme Court has repeatedly upheld restrictive zoning of sexually oriented businesses, recognizing that local governments have substantial interests in regulating the location of said businesses, see *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); and

WHEREAS, the City Council desires to minimize and control the adverse effects of the enterprises regulated herein and thereby protect the health,

safety, and welfare of the citizenry; protect the citizens from crime; preserve the quality of life and the urban setting; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment of the U.S. Constitution or Article I., 9 of the Indiana Constitution, but to enact a content neutral ordinance which addresses the secondary effects of the enterprises regulated herein.

NOW, THEREFORE, BE IT ORDAINED by the Common Council of the City of New Albany, Indiana, under the authority of Chapter 147, Acts of 1947, and all acts amendatory thereto, of the General Assembly of the State of Indiana, that the above-referenced Title and Chapter of the Code of Ordinances of New Albany, Indiana, be and the same is hereby amended as follows:

Section 1. That **Section 156.005 Definitions** be amended to add the following definitions:

(a) "Establish or Establishment" shall mean and include any of the following:

(1) The opening or commencement of any Sexually Oriented Business as a new business; or

(2) The conversion of an existing business, whether or not a "Sexually Oriented Business," to any "Sexually Oriented Business."

(b) "Nudity or a State of Nudity" means the showing of the human male or female genitals, pubic area, vulva, anus, anal cleft or cleavage with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

(c) "Operate or Cause to Operate" shall mean to cause to function or to put or keep in a state of doing business. "Operator" means any persons on the premises of a Sexually Oriented Business who is authorized to exercise overall operational control of the business or who causes to function or who puts or keeps in operation the business. A person may be found to be operating or causing to be operated a Sexually Oriented Business whether or not that person is an owner or part owner of the business.

(d) "Person" shall mean individual, proprietorship, partnership, corporation, association, or other legal entity.

(e) "Regularly Features" means the consistent and repeated offering of the identified goods or services to the public as one of the intended profit-making objectives of the commercial enterprise, which enterprise regularly holds itself forth to the public as a place where said goods or services may be obtained, as evidence by off-premises advertising or on-premises signage or advertising visible from a public right of way.

(f) "Semi-nude" or in a "semi-nude condition" means the showing of the female breast below a horizontal line across the top of the areola at its

highest point or the showing of the male or female buttocks. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit, or other wearing apparel provided the areola is not exposed in whole or in part.

(g) "Sexual Device" means any three (3) dimensional object designed and marketed for stimulation of the male or female human genital organ or anus or for sadomasochistic use or abuse of oneself or others and shall include devices such as dildos, vibrators, and penis pumps, and shall also include other devices with non-sex related utility, such as leather whips, straps, and ligatures when said devices are marketed in a context suggesting sexual or sadomasochistic purposes. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

(h) "Sexually Oriented Business" means and includes those businesses defined as follows:

(1) "Adult Bookstore" or "Adult Video Store" means a commercial establishment that has a "significant or substantial" percent of its stock-in-trade or derives a "significant or substantial" percent of its revenue or devotes a "significant or substantial" portion of its interior business or advertising to the sale or rental, for any form of consideration, of any one of the following: books, magazines,

periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the display of "specified sexual activities" or "specified anatomical areas."

(2) "Adult Theater" means an establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions for viewing by persons which are characterized by the display of "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration. This definition shall include businesses which regularly feature view booths or rooms of less than one hundred fifty (150) square feet wherein such films are regularly shown.

(3) "Sexual Device Shop" means a commercial establishment that regularly features sexual devices. Nothing in this definition shall be construed to include any pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services.

(i) "Specified Anatomical Areas:" means and includes any of the following:

(1) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areola; or

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(j) "Specified Sexual Activities:" means and includes any of the following:

(1) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts:

(2) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(3) Masturbation, actual or simulated; or

(4) Excretory functions as part of or in connection with any of the activities set forth in subdivisions (1) through (3) of this subsection.

(k) "House of Worship" means any church, synagogue, mosque, temple, or building which is used primarily for religious worship and related religious activities.

(l) "School" means any nursery school; daycare facilities; preschools; kindergarten schools; public or private elementary, middle or secondary schools; special education schools; vocational schools, junior colleges or colleges and universities. School includes all school grounds.

(m) "Park" means any park used or designated as an area for recreational activities, including but

not limited to playgrounds, nature trials, swimming pools, athletic fields, basketball, baseball, tennis courts, walking paths or similar public land within the City of New Albany.

(n) "Permittee" means a person whose name appears on the permit/application to operate a Sexually Oriented Business.

(o) "Significant or Substantial" means thirty (30%) percent or more.

Section 2. That **Section 156.075 "Primary Permitted Uses", Table 1 AUTHORIZED USES** be amended by adding the use "Sexually Oriented Business" under the subheading Miscellaneous Sales and Service and inserting the notation for a permitted use ("X") under the district columns; C-2, C-3, I-1a, I-1b and I-2.

Section 3. That **Section 156.079 ADDITIONAL PROVISIONS; EXCEPTIONS** be amended by adding a new subsection (m) entitled "Sexually Oriented Business";

(a) Purpose and Findings.

(1) Purpose. It is the purpose of this ordinance to regulate certain sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of adult uses within the City. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative

materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material.

(2) Findings. This ordinance is based on the City's general police power, as well as on the evidence of the adverse secondary effects of sexually oriented enterprises, which is within the common knowledge of municipalities and is widely reported in judicial opinions, media reports, land use studies, and crime impact reports made available to the City Council, several of which are set forth herein. Additionally, the City Council relies upon repeated judicial findings of municipalities' reasonable reliance on this body of secondary effects evidence to support time, place, and manner regulations of sexually oriented businesses. The City Council relies upon and incorporates the findings of secondary effects discussed in the following non-exhaustive list of cases: *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2004); *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 426 U.S. 50 (1976); *Barnes v Glen Theatre, Inc.*, 501 U.S. 560 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Sewell v. Georgia*, 233 S.E.2d 187 (Ga. 1977), *dismissed for want of a substantial federal question*, 435 U.S. 982 (1978); *Schultz v. City of Cumberland*, 26 F.Supp.2d 1128 (W.D. Wisc. 1998), *aff'd in part, rev'd in* part, 228 F.3d 831 (7th Cir. 2000); *Blue Canary Corp. v. City of*

Milwaukee, 270 F.3d 1156 (7th Cir. 2001); *Matney v. County of Kenosha*, 86 F.3d 692 (7th Cir. 1996); *Berg v. Health & Hospital Corp.*, 865 F.2d 797 (1989); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (1999); *Entertainment Concepts v. Maciejewski*, 631 F.2d 497 (1980); *Genusa v. City of Peoria*, 619 F.2d 1203 (1980); *Graff v. City of Chicago*, 9 F.3d 1309 (1993); *North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441 (1996); *Chulchian v. City of Indianapolis*, 633 F.2d 27 (7th Cir. 1980); *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143 (E.D. Wash. 2004) (including exhibits cited therein); *Bigg Wolf Discount Video v. Montgomery County*, 256 F. Supp. 2d 385 (D. Md. 2003); *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill. 2d 123 (1988) (including cases cited therein); and other cases; and on reports regarding secondary effects from the following jurisdictions, including, but not limited to, Garden Grove, California - 1991; Los Angeles, California - 1977; Whittier, California - 1978; Austin, Texas - 1986; Phoenix, Arizona - 1979, 1995-1998; Minneapolis, Minnesota-1980; Houston, Texas - 1997; Indianapolis, Indiana - 1984; Centralia, Washington - 2003; Amarillo, Texas; Seattle, Washington - 1989; Oklahoma City, Oklahoma - 1986; and Dallas, Texas - 1997; Alliance, Ohio - 2002; St. Croix County, Wisconsin - 1993; Greensboro, North Carolina - 2003; Bellevue, Washington, - 1998; Newport News, Virginia - 1996; New York Times Square study - 1994; and also on findings from the Report of the Attorney General's Working Group On The Regulation Of Adult uses, (June 6, 1989, State of Minnesota), the Council finds:

(3) Sexually oriented businesses should be segregated from one another by a minimum distance and are further inappropriate for locations in close

proximity to houses of worship, schools, day care centers, and residential neighborhoods because sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, illicit and unsanitary sexual activity, illicit drug use, decreased desirability of and negative impacts on the use of surrounding properties, urban blight, litter, and sexual assault and exploitation.

The City has a substantial government interest in regulating the proper location of sexual enterprises and has a substantial government interest in preventing each of the aforementioned adverse effects.

(b) Locational Standards

(1) It shall be unlawful to establish, operate, or cause to be operated a sexually oriented business in the City of New Albany, except in the following zoning districts: C-2, General Business, C-3, Regional Shopping Center, I-1a, Light Industrial, I-1B, Light Industrial Park and I-2, Heavy Industrial.

(2) It shall further be unlawful to establish, operate, or cause to be operated a sexually oriented business in the City of New Albany, unless business shall be at least:

(a) 1,000 feet from any sexually oriented business; and

(b) 1,000 feet from any house of worship, day care center, public or private elementary or secondary schools; and

(c) 1,000 feet from any residential district and 500' from any dwelling.

For the purpose of this section, measurements shall be made in a straight line in all directions without regard to intervening structures or objects, from the nearest portion of a residential district line or structure to the building or structure used as a part of the premises where an adult business is to be established.

(3) Notwithstanding any other provisions to the contrary, the sexually oriented businesses regulated herein shall be considered permitted uses in the zoning districts where sexually oriented business are allowed to locate under the Zoning Code, and shall not be subject to the standards applied to special or conditional uses.

(c) Nonconforming Use(s)

(1) A nonconforming sexually oriented business, lawfully existing in all respects prior to the effective date of this ordinance, may continue to operate for two (2) years following that date in order to make a reasonable recoupment of its investment in its current location. At the conclusion of said two (2) years, the use will no longer be recognized as a legal non-conforming use. A legal nonconforming sexually oriented business may apply for a Variance to permit a one or more six-month extension(s) of the original two-year period upon a showing of financial hardship.

An application for an initial extension based upon financial hardship shall be made at least sixty (60) days before the conclusion of the aforementioned two-year (2-yr.) period. If a hardship extension is granted, subsequent Variance applications for hardship extensions shall be made at least sixty (60) days before the conclusion of the non-conforming sexually oriented business's current extension period.

(2) Procedure for seeking hardship extension. An application for a Variance for a hardship extension shall be filed in writing with the Zoning Officer in accordance with Section 156.140 (D), and shall include evidence of purchase and improvement costs, income earned and lost, depreciation, and costs of relocation and evidence of compliance with the Code of New Albany. The Zoning Officer shall process the application in accordance with Section 156.145 BOARD OF ZONING APPEALS. The New Albany Board of Zoning Appeals shall issue a written decision within ten (10) days after the public hearing on the application for a hardship extension. The hardship extension shall be considered in terms of IC 36-7-4-918.5.

(d) Severability

Each section, provision, phrase, and word of this ordinance is hereby declared to be independent and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any portion herein, or the application thereof to any person or circumstance is held to be invalid, the remaining portions and the application of such portions to any person or circumstances other than those to which it is held

invalid, shall not be affected thereby, and it is hereby declared that such portions would have been passed independently of such section or provision so known to be valid.

(e) Conflicting Provisions Repealed

Any provisions in the Code of New Albany in conflict with this ordinance are hereby repealed.

PASSED and **ADOPTED** by the Common Council of the City of New Albany, Indiana, this 5th day of May, 2004.

s/ William Schmidt
William Schmidt, President
Common Council City of New Albany

ATTEST:

s/ Marcey J. Wisman
MARCEY WISMAN, CITY CLERK

PRESENTED by me to the Mayor of the City of New Albany, Indiana, this 5 day of May, 2004.

s/ Marcey J. Wisman
Marcey J. Wisman, City Clerk

APPROVED AND ACCEPTED by me this 5 day of May, 2004.

s/ James E. Garner, Sr.
James E. Garner, Sr., Mayor
City of New Albany, Indiana

APPENDIX G

Resolution No. R-04-35

RESOLUTION CONCERNING ADDITIONAL LEGISLATIVE MATERIALS SUPPORTING REGULATION OF SEXUALLY ORIENTED BUSINESSES

WHEREAS, the City has adopted Ordinance No. G-04-10 and Ordinance No. Z-04-20, pertaining to regulation of sexually oriented businesses, and

WHEREAS, the Council hereby reaffirms the rationale for those ordinances, to wit, that "sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, illicit and unsanitary sexual activity, illicit drug use, decreased desirability of and negative impacts on the use of surrounding properties, blight, litter, and sexual assault and exploitation. The City has a substantial government interest in preventing each of the aforementioned adverse effects," and

WHEREAS, this substantial government interest exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses, and

WHEREAS, the Council reiterates its intent and purpose to prevent the negative secondary effects of

sexually oriented businesses, not to regulate the content of any speech, and

WHEREAS, the Council has previously expressed reliance upon, among numerous other cases, the federal court's decision in *World Wide Video of Washington, Inc. v. City of Spokane*, 227 F.Supp.2d 1143 (E.D. Wash. 2002) (including exhibits cited therein), and that decision has been upheld on appeal, 386 F.3d 1186 (9th Cir. 2004), and

WHEREAS, the Council has obtained and reviewed additional exhibits that were part of the legislative record in that case, as well as exhibits from other municipalities, which exhibits detail harmful secondary effects occurring in and around sexually oriented retail stores.

NOW, THEREFORE, BE IT RESOLVED by the Common Council of the City of New Albany, Indiana, as follows:

The City Council hereby expresses reliance on the following materials which provide additional justification for Ordinances No. G-04-10 and No. Z-04-20:

1. *World Wide Video of Washington, Inc. v. City of Spokane*, 386 F.3d 1186 (9th Cir. 2004).
2. Additional excerpts from the City of Spokane legislative record for the adult retail use ordinance litigated in *World Wide Video, Inc.*
3. Police reports from the City of Littleton, Colorado, concerning secondary effects occurring at and around Christal's, a retail

adult bookstore. *See City of Littleton v. Z.J. Gifts D-4*, LLC, 124 S.Ct. 2219 (2004).

4. Expert opinions of Richard McCleary, Ph.D., filed in *New Albany DVD, LLC v. City of New Albany*, U.S. Dist. Ct., S.D. Ind., Case No. 04-0052, which conclude that public safety-related secondary effects can be establish by methods that do not rely on formal, systematic designs, and that the distinction between "on-premise" and "take-home only" sexually oriented businesses is irrelevant to measuring the public safety risk posed by sexually oriented businesses.
5. *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994).
6. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998).
7. *Z.J. Gifts D-2, LLC v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998).
8. *Z.J. Gifts D-2, LLC v. City of Aurora*, 933 P.3d 633 (Colo. App. 2004).
9. *State ex rel Nasal v. BJS No. 2, Inc.*, 127 Ohio Misc.2d 101 (Ct. Comm. Pl. 2003).
10. Police records documenting forty-one (41) arrests for public masturbation at an adult bookstore in Indianapolis.

This Resolution is approved and adopted this _____ day of October, 2004.

_____

WILLIAM H. SCHMIDT, President
New Albany Common Council

ATTEST:

_____

CITY CLERK

CERTIFICATE OF PRESENTATION TO MAYOR

The undersigned hereby certifies that the Resolution set forth herein above was presented by me as the duly elected New Albany City Clerk, or designee, to the Mayor of the City of New Albany this _____ day of _____, 2004.

_____

City Clerk

APPROVAL BY MAYOR

The Resolution set forth herein above was accepted and approved by me as Mayor of the City of New Albany, Indiana, this ___ day of _____, 2004.

_____

James E. Garner, Sr.
Mayor, City of New Albany

ATTEST:

_____

CITY CLERK

161

(4)

No. 09-1027

Supreme Court, U.S.
FILED
MAY 12 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,

Petitioner,

v.

NEW ALBANY DVD, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

NEW ALBANY DVD'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Throughout this response, the Plaintiff-Appellee, New Albany DVD, LLC, will be referred to as "DVD." The Defendant-Appellant, City of New Albany, Indiana, will be referred to as the "City."

PROCEDURE

This case comes to the court in an unusual posture. DVD filed suit challenging the constitutionality of the City's moratorium on "adult" businesses and its refusal to inspect and issue the store a certificate of occupancy ("C.O."). Afterward, the City passed an adult entertainment code (it did not previously have one), which was also challenged under the First Amendment, i.e., the code did not pass muster under *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002).

Two evidentiary hearings were conducted, and Judge Barker granted a preliminary injunction. The City appealed Judge Barker's order to the Seventh Circuit Court of Appeals. After four years, the Seventh Circuit remanded the case to the District Court and ordered that an evidentiary hearing be held. The City then filed its petition with this Court.

In reading the City's petition one might conclude that this case has been subject to extensive discovery. "Even if, after six years of litigation, the city were to develop additional evidence . . . " City's Petition, page

29. However, *no discovery* has ever been conducted because the case was tolled based upon Judge Barker's decision not to enter a case management order – thereby prohibiting discovery. See Rules 16(b) and 26(d) and (f), Fed.R.Civ.P. The City's appeal was filed February 1, 2005. On October 26, 2009, as noted above, the Seventh Circuit reversed, finding that Judge Barker should hold an additional hearing consistent with its opinion and its opinion in *Annex Books*.[1] See *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009). Subsequently, *at the City's request*, Judge Barker stayed any further proceedings.

Considering the preliminary and limited nature of this record/case and the argument presented herein, this court should deny the City's petition.

FACTS

With all due respect, the City has omitted important facts and skewed others. The City may have truncated its factual recitation knowing that most cases, and resulting appellate opinions, are often fact-sensitive.

[1] *Annex Books v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009).

DVD – THE STORE

The City's brief gives the impression that DVD is located in the heart of a residential area across the street from a church. That is not an accurate characterization. The area can be more accurately described as motley-heavy commercial, if not industrial. The store is located on a two-lane highway known as Highway 111 or Main Street. This artery leads to a local gambling casino, known as Caesar's. Directly behind DVD is a garbage truck depot where garbage trucks are maintained and cleaned, and within eye-sight of DVD is a sewage treatment plant. Directly across the highway is a gasoline station with a convenience store which also sells sexually explicit magazines. A large box of sexually-themed materials (a great many titles) were purchased from that store and brought to the preliminary injunction hearing. Next to the convenience store is the church described in the City's petition.

Contrary to the City's representations, there are other (unregulated) stores in the City which sell large quantities of sexually explicit materials (thousands of titles) but this will be discussed in more detail below. For whatever reason, the City does not complain about these other video stores even though they have been in business for years.

Upon purchasing the property the DVD principals remodeled the building. It is approximately

2500 square feet and is aesthetically pleasing, if not somewhat austere in appearance.[2] The store sells books, magazines, and DVDs which contain articles, photographs, and cinematography which is sexually explicit, but non-obscene, in nature. The store does not provide on-site entertainment such as a movie theater, live entertainment, e.g., dancing, or booths of any kind to watch the movies on premises. In the words of the Seventh Circuit, "Customers buy books, magazines, or videos which they read or watch at home." *New Albany DVD, LLC v. New Albany*, 581 F.3d 556 (7th Cir. 2009). Stated differently, DVD is purely a retail store.[3] Although clearly the genre of materials is distinct, it is the functional equivalent of the local "Blockbuster."

THE CITY'S CONDUCT AND FIRST EVIDENTIARY HEARING

Before purchasing the DVD property its principals hired a lawyer to confirm that the property could be used as a retail store. At that time, the City had no regulations addressing "adult entertainment" businesses. The architectural blueprints submitted to the City with DVD's business application bore the title

[2] Photographs and testimony were presented to the court supporting these points.

[3] In that respect, it is similar to the Internet, satellite television, or even hotels which make sexually-themed movies available for a fee.

"New Albany DVD, Retail." The City approved DVD's application and issued an improvement location permit ("ILP"). This document reflects that the use for the building was "commercial." With the application and review process complete, DVD was ready to open.

> Plaintiff bought land for this operation in 2003, secured all necessary licenses, and renovated the site's store to meet its requirements. The land was properly zoned for the business it proposed to operate.

New Albany DVD, LLC v. City of New Albany, 581 F.3d 556 (7th Cir. 2009).

At the time of the first evidentiary hearing, Eddie Hancock was New Albany's building commissioner. His predecessor, Mr. House, approved DVD's permit application. Applications are sent to the zoning department for review before permits are granted, and DVD's permit was issued December 29, 2003. The court questioned Mr. Hancock concerning the process.

> The Court: So something triggered that decision that zoning either decided that they didn't need to change or whatever, but something signaled your office – if the ordinary procedures were followed – to say everything's go on this issue, issue the permit, right? That's what the process looks like.

> Witness: I'm gonna [sic] agree with what you're saying because I wasn't there at the time.

Because Hancock was not the building official at the time, he was uncertain what happened to DVD's application other than it was approved and the City scheduled a final inspection.

> Counsel: We know that the city scheduled that inspection because they generated a form, they put it on their calendar, they used a pre-printed form and it was in the hopper to go out and inspect it, right?
>
> Witness: Yeah, it was – you're right, yeah.

Considering the issuance of the permit and the scheduled final inspection, Mr. Hancock's personal appearance at DVD's property on February 19, 2004 was questioned. He testified that he did not know why the City cancelled the inspection. However, at the special meeting held later that evening (the moratorium) the City attorney prepared a letter for Hancock's signature stating that DVD's building was "unsafe." Hancock had the letter delivered to DVD thereby preventing the store from opening. The letter did not explain what the problem was, it just said that the building was "unsafe." Judge Barker, who does not mince words, made it clear that she thought the City was engaging in questionable tactics.

The Court: Wait. Is there anything in that letter where you put this Mr. Johnson on notice that he's got a zoning problem?

Witness: No, no.

The Court: So you came up with unsafe property?[4]

Witness: That's my feeling, if it's not been inspected and accepted by the inspector; yes, ma'am.

* * *

The Court: Yeah, you snookered him, didn't you?

Witness: You think so?

The letter stated that because DVD's building was "unsafe," an administrative hearing was scheduled for March 9, 2004. The letter was a ruse and the hearing was never held.

Counsel: If it was truly an unsafe building there would have been a hearing on March 9 and there's never been a hearing. This closed and just disappeared.

---

[4] The definition for "unsafe" building, per the City's code, has no application to DVD's property. It refers to hurricanes and how buildings can be physically unsafe causing injury.

Judge Barker questioned why the chief of police and high-ranking City officials converged on DVD if it had nothing to do with the "adult" nature of the business. Hancock said that he just rode down there because someone came into the City office and stated that a new business had opened in town. Mr. Hancock's testimony was circular and confusing – causing the court to backtrack and ask for clarification.

The Court: I thought you told me you didn't.

Witness: I didn't say I didn't. I just told – told you I rode down there. I didn't say what time I went down there.

The Court: I said around 2:00 o'clock and you said, oh, no, no, no.

At this point the fact that Mr. Hancock had visited DVD twice that day, once at 2:00 p.m. and again at 6:00 p.m., became clear. After all of the confusing testimony, the court questioned Hancock's candor.

The Court: Oh, are you telling me the truth today?

Witness: I wouldn't lie to you. Too old to start lying.

John Rosenbarger is the director of the City's planning commission. Although he had no personal involvement in DVD's application/opening, he testified

that a retail business must obtain an improvement location permit ("ILP") from the City prior to opening. However, he acknowledged that DVD in fact was issued an ILP.

> Q. So an ILP was issued to DVD; that's not in dispute?[5]
>
> A. Yes, this was issued by Gary House.

The comments made the evening during the "moratorium" hearing are enlightening as to the true motivations at work here. The record reveals this government activity had little, or nothing, to do with whether DVD's store might produce adverse secondary effects. Rather, certain members of the citizenry and the City hierarchy found the content of the materials sold by DVD to be offensive. New Albany's mayor stated, "so we will do everything we can to continue on our path to keep it closed."

> My mind's working already. Somebody needs to open up a daycare next to that place and we'll close it down right now, . . .
>
> * * *

---

[5] The irony is that at Judge Barker's urging, DVD submitted another (second) application addressing zoning. In the City's response, filed with the court, it acknowledged that zoning did not prevent DVD from opening on February 19, 2004. Instead, the City's attempt to prevent DVD from operating was based upon the passage of its adult code – passed weeks *after* DVD's scheduled final inspection

> Every single law that pertains to building ought to be checked and double checked.
>
> * * *
>
> . . . [t]here's all kind of things to do . . . * * * . . . I want you to be devious.

The City's sexually oriented business code, Appendix E, App. 48-A, City's Petition, was created *after* DVD's application was approved and its lawsuit filed. In passing the code the City held several meetings but spent little effort addressing claims that stores such as DVD are linked to adverse secondary effects. Instead, the goal was to use any method possible to keep DVD closed. For instance, at the March 4, 2004 meeting, the City committee discussed the fact that oil tanks may be buried on DVD's property which may keep it closed.

> Mr. Coffey: Eddie, is there a way you can find out what – about the tanks – whether there's tanks there or – or do we have to go through EPA or what.

Committee Member Walter promoted using what she termed "legal harassment" to close DVD.

> Ms. Walter: We'll have to handle this one –
>
> Rev. Cheek: Right.
>
> Ms. Walter: – particular one. But I think that if you – if I can give you

some of my ideas about **legal harassment**,[6] we can –

Rev. Cheek: You certainly can.

Ms. Walter: (laughter)

Rev. Cheek: I have my eye on –

Ms. Walter: **We can try to run 'em out** – there he is. Hey, Danny, boy.

March 10, 2004, Afternoon Meeting.

The committee continued to come up with various schemes to keep DVD closed, including permit problems, the state fire marshal, the issue of alcohol (DVD does not sell or dispense alcohol), and the creation of what the committee termed "the porn police." The issue of an improperly erected fence was also discussed.

The committee also addressed a City-owned alley that exists on DVD's property and how that might keep DVD closed. Mr. Coffey stated that such an alley typically would have been vacated, but that he was thankful that normal procedures had not been followed.

Mr. Coffey: If you don't think God doesn't work, let me tell you something, normally, we vacate alleys.

---

[6] All emphasis in this brief has been added unless otherwise noted.

Rev. Cheek: mmh-hmm.

Mr. Coffey: And for some reason, we held this one up. So, that was the good Lord's hand coming down on us.

March 10, 2004, Afternoon Meeting.

Throughout the meeting remarks were made concerning the presence of DVD's court reporter.

Mr. Coffey: I didn't know we were going to have company.

Court Reporter: I'm here just to simply get a record, that's all.

* * *

Mr. Coffey: I would not – I'm sorry. I'm not trying to be mean, but some people call it making a living, some people call it other things.

March 10, 2004, Afternoon Meeting.

Mr. Coffey: Let me ask you something, when you all have your meetings, are we allowed to come to them?

Court Reporter: I am not on anybody's side. I am simply an unbiased party.

Mr. Coffey: No, I'm just saying, they don't tell us when they have their meetings.

Court Reporter: If it's publicized, then, –

Mr. Coffey: This wasn't publicized. This wasn't a public meeting.

Court Reporter: They just –

Ms. Walter: What outfit is she with?

March 10, 2004, Afternoon Meeting.

* * *

Mr. Coffey: Well, I'll just be honest with you guys, be very careful what you say, you know, these people wouldn't grant us the same respect that we're granting them. They're using the same laws that govern people to be honest and decent for their own personal uses.

The comments reflect that these people simply did not want adult material in their community because of the content of the materials.

SECOND EVIDENTIARY HEARING

The second hearing in the District Court focused on whether retail stores that sell adult magazines and the like (merchandise to "take home") harm the community – "adverse secondary effects."

Dr. Daniel Linz

Dr. Linz, a professor at the University of California, Santa Barbara, was accepted as an expert on adverse secondary effects. Linz reviewed the record relied upon by the City in passing its ordinance. The City did not rely upon any study that dealt exclusively with "retail" establishments such as DVD.

Dr. Linz discussed the theories proposed by the City's expert. If the City's theory is that the content of the materials (tapes, magazines, etc.) cause harm, it would make no difference where they were reviewed – in one's home, a hotel, on the internet, etc. In other words, the "secondary effects" would not be linked to the distributor. Additionally, if this hypothesis held weight there would be evidence that these other sources, the Internet, cable television and satellite, caused the same harm.

On the other hand, if the City's theory is that bad things happen simply because people congregate at DVD's business location, this same theory would hold true at any business where people congregate – irrespective of the materials or services offered.

To bring this issue closer to home, the focus shifted to any adverse secondary effects linked to the *other* businesses that sold sexually explicit materials in New Albany – long before DVD came to town. Two stores in New Albany, specifically J&J Video and Movie Gallery, sell *large* volumes of sexually explicit videotapes.

J&J had *1876* sexually explicit videotapes and Movie Gallery had *2981* for sale or rent. Linz sought data from the City police addressing these two stores as well as two other non-adult video stores and a local non-adult bar. The following chart shows the police calls from January 1, 1999 to August 20, 2004. The column furthest right shows total calls excluding alarms triggered.

Monon Station (Non Adult, Alcoholic Beverage Establishment)	494	449
Hollywood Video (Non Adult)	157	92
Blockbuster (Non Adult Materials)	98	56
J&J Video (Adult Materials)	50	28
Movie Gallery (Adult Materials)	40	31

J&J Video is in a plaza with several other businesses which share a single address. Likewise, Movie Gallery shares its address with another business. The above figures include all police calls to the *collective addresses*, not the two stores in particular, thus presumably the police calls would be even lower.

There was no evidence in the City record (based upon local citizen testimony) that the City was concerned about pornographic "litter" associated with adult businesses. Dr. Linz concluded that the City's ordinance was invalid.

Dr. Richard McCleary

Dr. McCleary, the City's expert, testified that the City's ordinance was based upon a body of data that was transported into the ordinance. He conceded that there was no specific nexus between the imported data and the scope of the City's ordinance.

The court questioned McCleary about reliance upon studies that are twenty-five years old. "Is there ever a point at which the data gets old and stale and unuseable?" McCleary replied, "I would think not." He stated that criminologists rely upon studies which are 100 to 200 years old – but none of those studies involve "adult" businesses. In response to the court's questioning, McCleary stated that he did not believe there were any health consequences associated with retail adult stores.

McCleary described J&J Video as a small store, about 1200 square feet, with most of it devoted to mainstream videos. He did not think J&J was a fair comparison because it is a neighborhood video store that "[w]ould not fit into that theory of attractive hot spot." He also did not think Hollywood Video was a good comparison because it is a large store, approximately 8400 square feet.

Although McCleary conceded that the convenience store across the street from DVD sells sex-themed materials, he thought it should be treated differently because of the "[w]ay it sells it." He seemed to have difficulty addressing the court's concerns why this store did not cause adverse effects.

He opined that the convenience store does not attract the same type of customers as DVD.

As far as the church, the City's expert did **not** see that as a public safety issue. "The house of worship I do not see as largely a public safety issue, but I'm more troubled by the residential areas, distances to residences." He repeated this refrain in response to the court's question of whether the alleged criminal impact of DVD was lessened based upon the requirement that it be 1000 feet from a house of worship. "I would think that would **not** be a major public safety hazard." McCleary did not think there would be much of an impact on the church because worship on Sunday morning is very slow time for sexually-oriented business. "For that reason, public safety is not relevant."

The City's theory is that DVD attracts customers who are soft targets for predatory criminals. McCleary continued to repeat this theme, specifically that the **customers of** DVD are *not* criminals but instead they are the *victims* of crime. McCleary did not believe the DVD site could be patrolled properly by the police (to provide security for the patrons) because of the "L-shaped" fence. "[I]t hampers the ability of the police to economically maintain security in that block because when they drive by they can't see what's going on in that parking lot." He thought the fence should be removed. The issue of pornographic litter did not enter into his opinion. "[I]'m not saying anything about litter." He also was

not advancing the notion that viewing adult materials causes adverse secondary effects.

McCleary acknowledged the Fifth Circuit's observation concerning his "Garden Grove" study wherein it stated that the study "[n]eglected to indicate whether any of [the seven adult businesses studied] provided exclusively off-site entertainment." In fact, upon review of that study, there is nothing indicating it is devoted to retail establishments.[7] Although McCleary was opposed to Dr. Linz's police-calls analysis, he acknowledged that the Eleventh Circuit invalidated an ordinance based upon such calls.

While the court's questioning focused upon whether the ordinance had to be narrowly tailored when it targeted retail-only establishments, the City held to the claim that DVD's patrons would be prey for local criminals.

> Mr. Mason: I want to make sure I understand the composite of your argument. You're saying the store across the street, even if you go in there and buy 200 or 500 dollars worth of magazines, one magazine or forty magazines, you're saying that that store doesn't cause crime

[7] McCleary agreed that he previously testified that the Garden Grove study addressed on-site entertainment ("peep shows") versus pure retail.

> relating to the material because it doesn't have enough of the material; thus, it's not a magnet for people to travel long distances who are then vulnerable and victimized by the local people in the community?
>
> McCleary: I think I agree in principle with that statement.

According to McCleary, DVD's patrons will fall prey to the predators in New Albany (the local community) because the patrons want to remain anonymous, they travel long distances and carry cash to purchase movies and magazines from DVD. Judge Easterbrook dismissed this paternalistic argument. The police must protect the readers from the hecklers and thieves, rather than ease their workload by forbidding the speech. *New Albany DVD, LLC v. New Albany,* 581 F.3d at 560. McCleary had difficulty explaining why DVD's business is different from someone purchasing a video from satellite television or why patrons would not have to disclose their identity when using their credit card to rent a video from a local adult store.

He agreed that the City's 30% threshold (numbers of adult videos[8] necessary to trigger the adult restrictions) is an unreliable factor if the City is

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[8] See definitions of "adult bookstore" and "significant and substantial," City's Appendix E, pp 54a and 57a.

trying to reduce secondary effects. The court questioned the City's hypothesis that a line can be drawn establishing what percentage of adult videos triggers secondary effects.

The thrust of McCleary's argument was that it was the commercial activity associated with DVD which caused the secondary effects, not DVD's customers or the content or type of materials sold.[9]

REASONS FOR DENYING WRIT

INTRODUCTION

The City's brief and the briefs of amici express distress over the fact that the City must produce credible evidence to support its hypothesis that DVD harms the community, i.e., causes adverse secondary effects. Considering that DVD has been operating under an injunction for over five years, the City should welcome the opportunity to now show that DVD is a "bad" business. Some might consider this to be the perfect experiment.

The problem is that there is no evidence, not even shoddy evidence, that DVD is linked to adverse

[9] Following this analysis to its logical end would lead the reader to conclude that all businesses with a large number of patrons (any commercial activity) would cause adverse secondary effects – which obviously has nothing to do with sexually-themed businesses.

effects. Clearly the Seventh Circuit was intrigued by this because the court specifically stated that DVD has been operating under an injunction and, therefore, if there is evidence, it will be easily proved on remand. *New Albany DVD, LLC v. City of New Albany*, 581 F.3d at 561.

This is the crux of the matter. These attorneys and the City are aware of DVD's place in the community subsequent to the 2005 injunction is known. DVD has improved the neighborhood and is one of the nicest buildings for blocks.[10] Not one complaint of litter, much less "smutty litter" (Judge Easterbrook's term), has been made. No crime has been linked to DVD. Since October, 2005 the police have been called to the business seventeen times. None of the calls are linked to bad behavior traced to the business. For instance, one of the calls involved the theft of the copper from DVD's air conditioning unit, some were for false burglar alarms, one was to report an insufficient-funds check, and another involved the theft of a four dollar piece of merchandise from the clerk's counter, etc. In comparison, the convenience store across the street from DVD had 131 police calls and another "Circle K" in New Albany had 114. In addition, DVD has data concerning a

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[10] The City offered no evidence that DVD or retail stores lower property values or cause dilapidation. In fact, it was noted during one or more of the City's meetings that the DVD property would positively impact local property and values.

number of other business/police comparisons in New Albany since the 2005 injunction.

The doctrine of adverse secondary effects is not a charade that can be used to restrict or close a business because the government finds it politically or morally offensive. Presumably, every Justice[11] of this court believes that facts and truth are the touchstone of the equation. If the facts were not the backdrop of review, then intellectual honesty would go out the window.

ALAMEDA BOOKS AND CITY'S CONFLICT ARGUMENT

Upon reading the City's petition and the briefs of amici, one would think that the proverbial sky is falling. For obvious reasons, these papers are emotionally charged. The argument that the Seventh Circuit has deviated from this court's jurisprudence is far off the mark.

Eight years ago this court issued its opinion in *Alameda Books*.[12] A fair review of that opinion reveals that the Seventh Circuit, especially considering the record in this case, followed the lead of this court. In

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[11] Justice Alito (then judge) and the Third Circuit in a pre-*Alameda Books* opinion addressed this issue in *Phillips v. Borough of Keyport*, 107 F.3d 164, 173 (3rd Cir. 1997).

[12] *City of Los Angeles v. Alameda Books*, 535 US 425 (2002).

fact, a close reading of *Alameda Books* demonstrates that the City has no basis for complaint here.

Justice O'Connor, Chief Justice Rehnquist and Justice Thomas

The *Alameda* plurality opinion was authored by Justice O'Connor and joined by justices Rehnquist and Thomas without opinion. The singular question presented was whether the local study conducted by Los Angeles constituted sufficient evidence to place a material fact in issue, i.e., the claim of adverse secondary effects, thus moving the case toward trial. The plurality found that it was. In so doing, it noted that the case was at a very early stage in the process (summary judgment) and that the plaintiff-adult business, bookstore combined with an arcade, did *not* offer a competing theory challenging the City's 1977 study nor data addressing elevated crime rates in neighborhoods with a concentration of adult businesses in Los Angeles. See *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 437-438.

The plurality's language indicates that this court permits (if not encourages) "adult" litigants to offer independent evidence either challenging the City's propositions or supporting their own. This statement can be traced to the following language. "In particular, they do not offer a competing theory, let alone data, that explains why the elevated crime rate in neighborhoods with a concentration of adult businesses . . . " *Id.*, 535 U.S. at 437. There is also the

oft-quoted statement that the City cannot rely upon shoddy data or reasoning, and that its rationale is subject to challenge "[b]y demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings . . . " *Id.*, 535 U.S. at 438. The plurality determined that the case should proceed past summary judgment because the City's local study supported its theory that a concentration of adult businesses[13] caused adverse secondary effects.

The statement at 535 U.S. 440 is of special interest here. There, Justice O'Connor wrote that Los Angeles did not have a treatment group (an experiment, if you will) allowing a comparison between adult video arcades as opposed to multiple use businesses, specifically bookstores and arcades. Therefore, Los Angeles could not be faulted for not having an opportunity to address whether those singular businesses (arcades) cause secondary effects. Considering this, how can New Albany complain of the Seventh Circuit's opinion? There is a specific treatment group – the perfect experiment, specifically a business which has been in business for over five years in which to conduct its secondary effects analysis. The problem (from the City's perspective) is that it knows what the evidence reveals and it wishes to ignore it.

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[13] Which, per Justice O'Connor, by definition would include multiple businesses under the same roof.

The *Alameda Books* plurality opinion was premised upon the requirement that the City produce evidence establishing that adult establishments produce a greater amount of criminal activity than non-adult establishments. If this were not the case, Justice O'Connor would not have noted this at 535 U.S. 436 in writing "[p]roduce greater[14] levels of criminal activity . . . " In other words, Justice O'Connor was addressing the issue of whether adult businesses do, in fact, generate greater levels of adverse effects than other enterprises. But here, there are several businesses in the City of New Albany that not only sell sex-themed materials but sell them in large quantities. Judge Barker heard two days of evidence, including evidence that businesses which sell "adult materials" in New Albany generate far less criminal activity than their non-adult counterparts. It is enlightening that the City refused to challenge and offer any evidence disputing DVD's local data. From a visceral standpoint it is understandable why the City complains about this evidence, but its legal objections run contra to this court's precedent.

Justice Scalia

Justice Scalia in his concurrence reaffirmed two points. First, he was not abandoning *stare decisis*. "I

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[14] Even in a non-First Amendment setting this court has stated that comparables should be reviewed to determine if there exists a fair or disproportionate impact. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1985).

join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the 'secondary effects . . . '" *City of Los Angeles v. Alameda Books*, 535 U.S. at 443. He followed up by noting his prior position that the First Amendment does not prevent communities from suppressing businesses which pander sex. Yet this is a far cry from stating that Justice Scalia would champion overruling decades of law that provides First Amendment protection to provocative entertainment and materials, including sex-themed books and magazines.

Justice Kennedy

It has been stated many times that Justice Kennedy's concurrence is the glue that binds the *Alameda Books* opinion together and is considered the court's holding.

He begins by noting that "speech" can cause secondary effects, . . . *Id.*, 535 U.S. at 445. Is that premise satisfied here? The City's expert testified that it was not the speech – the content of the materials sold at DVD – that caused crime. Rather the City's theory is that New Albany's citizens are the criminals who "prey" on DVD's customers. Without characterizing the nature of that hypothesis, by this very statement it's not DVD or the "speech" that it offers that (purportedly) causes adverse secondary effects – it is the citizens of New Albany themselves.

Justice Kennedy continues by noting that the "material" inside an adult movie theater or adult bookstore constitutes speech but "[t]he consequent sordidness outside is not . . . " *Id.*, 535 U.S. at 445. Considering this statement, presumably Justice Kennedy would not support an ordinance that is based upon an unsound evidentiary foundation or disproved through credible evidence.

That leads us to Justice Kennedy's statement that an ordinance directed at the secondary effects of "adult speech" does not (necessarily) constitute impermissible content discrimination. *Id.*, 535 U.S. at 447-448. Would this hold true if the record established that the City's motivation was to actually suppress speech because of its emotional upset over the nature of the business and no credible evidence supported its secondary effects hypothesis? That is the debate the Seventh Circuit reviewed. Here, the Seventh Circuit merely remanded the case for an additional evidentiary hearing to focus upon the nature and strength of the City's secondary effects claims and to determine if a *preliminary*[15] injunction should issue.

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[15] Preliminary injunctions are exactly that, preliminary in nature. They involve a balancing of factors with the backdrop being factual review and independent analysis of the law. Ultimately, the issue is a question of discretion and whether that discretion has been abused. *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005).

Justice Kennedy reiterates his point at 535 U.S. 452 where he discusses the theory underlying Los Angeles's 1977 study. "Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters and the crime rate may increase as a result." Here, the City's highly-paid expert testified to a completely contrary proposition – specifically that it is not DVD's customers that are unsavory but rather the locals who prey upon them. Considering this, how can the Seventh Circuit be faulted for stating that the City, through its police force, should control its own citizenry?

Justice Kennedy reiterates that the City's assumptions are subject to direct evidentiary challenge and can be invalidated. "If these assumptions can be *proved unsound at trial*, then the ordinance might not withstand intermediate scrutiny." *Id.*, 535 U.S. at 453. That is the purpose underlying the Seventh Circuit's remand. The Seventh Circuit, like this court in *Alameda Books*, reviewed the record evidence and determined that an additional evidentiary hearing should be held.

Justice Souter joined by Justices Stevens, Ginsburg and Breyer[16]

Justice Souter joins the discussion by highlighting that there is a "high risk" that restrictions

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[16] Justice Breyer joined part II of Justice Souter's opinion.

may be imposed on provocative speech which is disagreeable to government. 535 U.S. at 455. In those cases, strict scrutiny applies and leaves "few survivors."

Justice Souter's (and the dissenters') dispute with the plurality focused upon the evidentiary value of Los Angeles's 1977 study. "Its evidentiary insufficiency bears emphasis and is the principal reason that I respectfully dissent from the court's judgment today." 535 U.S. at 454. In other words, *Alameda Books*, like most cases, was a fact-driven opinion. DVD is likewise fact-driven. Obviously different courts will reach different conclusions based upon differing factual records – that is the fundamental nature of litigation and the court system. That is a core reason why this court should deny review.

In terms of this case the statements that appear at footnote five, page 462 in Justice Souter's *Alameda Books* opinion are especially interesting. He states that the question is open whether a City can rely upon the experiences of other cities when those experiences are contradicted by its own studies. These attorneys respectfully suggest that is what the plurality touched upon when it referenced the business's ability to challenge the City's hypothesis and present data of its own. Here, the City's evidence was challenged, debunked, and overtaken by evidence from the local community. This is distinct from the fact that the City was unable to present any evidence establishing that retail venues selling sex-themed

materials cause adverse secondary effects. DVD simply drove the point home with local data.

CONCLUSION

Through its remand, the Seventh Circuit has actually given the City a second bite at the apple. It is therefore surprising that the City appealed the Seventh Circuit's ruling. This case rides on its own facts, but it is not unique in terms of the law. The Seventh Circuit followed this court's guideposts and it should not be faulted for doing so.

Accordingly, the City's petition for certiorari should be denied.

Respectfully submitted this 13th day of May, 2010.

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No. 09-1027

MAY 24 2010

In The Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,
Petitioner,

v.

NEW ALBANY DVD, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief in opposition wholly fails to refute, and thus concedes, the extensive split in the circuits that has been percolating in the lower courts over *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), a "fractured decision" that "dozens of appellate decisions . . . have struggled to understand and apply" without producing "any concrete legal rule." (App. 44a) (Easterbrook, C.J.). Instead of addressing the question presented—a question of "utmost importance" to *amicus* International Municipal Lawyers Association and cities and counties nationwide—respondent quibbles about procedure and facts irrelevant to that question. For the (unrefuted) reasons stated in the petition, this Court should issue a writ of certiorari to review the decision below.

1. Respondent's statement about the procedural posture of the case is unavailing. First, respondent does not deny that the entirety of the City's secondary effects evidence—including land use and crime impact reports, judicial decisions, eyewitness observations of adverse impacts, and the testimony of the City's expert witness—is in the record and was evaluated by the lower courts. Respondent, whose counter-evidence is also in the record, is thus tellingly silent about *what* discovery would be taken that is relevant to the question presented. There is none. At bottom, respondent's argument assumes its own conclusion: that the City should have to begin the case anew to conduct an empirical, after-the-fact local study that the Seventh Circuit—in direct contravention of this Court's precedents—requires.

Second, respondent does not dispute that this Court often reviews First Amendment cases on preliminary injunction. Indeed, the only case that respondent cites on this issue, *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005), is consistent with the cases cited in the petition (at 29-30) in that the Court granted certiorari to review a First-Amendment based preliminary injunction.

2. As to the facts, respondent's roving statement—which is unsupported by *any* citations to the record—is: (a) irrelevant to the question presented, (b) includes material outside the record, and (c) is rife with inaccuracies.

a. Respondent's factual statement begins with an attempt to impugn the City's motives (Brf. Opp. 4-13) based on how various individuals—including citizens who are not City officials or employees—reacted when they learned that DVD had lied to the City about the kind of business it was establishing next to a home and across the street from a church. (R. 19, Wood Aff. at 1) (tile shop misrepresentation).

DVD's discussion is irrelevant for two reasons. First, it is irrelevant to the question presented, which asks whether the Seventh Circuit's new legal standard for secondary effects evidence contravenes this Court's precedents. Second, DVD's amended complaint challenging Ordinance G-04-10 did not claim that strict scrutiny applied or that the Ordinance banned or restricted speech because of objection to content. (R. 39.) Instead, DVD claimed that the City's secondary effects evidence was insufficient to satisfy intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). (R. 39, ¶ 29.) Moreover, under

O'Brien, "'this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (quoting *O'Brien*, 391 U.S. at 383-84).

The factual statement continues (Brf. Opp. 13-20) with commentary about the extensive secondary effects evidence, including competing expert witness testimony, presented to the district court—which concluded that the City *met* its burden under the "reasonably believed to be relevant" standard established in *Renton* and reaffirmed in *Alameda Books*. (App. 23a-24a.) Respondent's discussion, which goes to the merits of the question presented by the Seventh Circuit's departure from that standard, actually highlights elements of the circuit split shown in the petition and demonstrates that this case's full evidentiary record on secondary effects makes it an ideal vehicle for resolving the question presented.

b. Attempting to litigate the Seventh Circuit's new standard in this Court, respondent resorts to arguing evidence completely outside of the record. (Brf. Opp. 21-22) (alleging facts occurring after entry of the injunction and after oral argument in the Seventh Circuit). This is wholly inappropriate. *Russell v. Southard*, 53 U.S. 139, 159 (1851); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970). Moreover, this inappropriate argument simply underscores—again—the centrality of the question presented, which concerns whether a city must present empirical, localized proof that it has already suffered secondary effects in order to justify a *Renton*-type regulation designed to prevent them.

c. The inaccuracies in respondent's factual statements about early events in the case and the evidence presented at the second evidentiary hearing, though irrelevant to the question presented, are sufficiently egregious to warrant a response.

First, respondent attempts to obscure the fact that its adult bookstore is adjacent to a home and across the street from a church by describing the street it is on as "lead[ing] to a local gambling casino." (Brf. Opp. 3.) The casino is five to eight miles away. (R. 116, Tr. 101:20-24.)

Second, respondent parrots the Seventh Circuit's statement that respondent "secured all necessary licenses" prior to February 19, 2004. In fact, the district court found that DVD did not apply for an improvement location permit (ILP) prior to February 19, 2004, but did so only after the first evidentiary hearing. (App. 30a.) The initial application was denied based on safety issues (*e.g.*, a pole sign in the middle of the driveway providing ingress/egress from and to Main Street) and based on the location restrictions in the Ordinance. (R. 61, Ex. B.) After the site plan was amended to resolve the miscellaneous safety issues, the ILP was denied solely based on the location restrictions. (App. 30a.) Thus, the parties agree that the Ordinance is the only impediment to DVD's lawful operation at its present location. Moreover, as the Seventh Circuit observed, whether DVD opened lawfully "has no continuing import." (App. 3a.)

Similar observations refute respondent's challenge to the term "unsafe building" in the Notice-Order that the building commissioner applied to respondent's site on February 19, 2004. The term properly applies to a

building that is being used but has not been inspected for safety and thus lacks a certificate of occupancy. (R. 74, Tr. 79:6-8, 80:18-20.) Moreover, as noted above, the site was in fact unsafe for various reasons, including the dangerous location of the pole sign. (App. 15a; R. 61, Ex. B.)

Third, respondent cites its own counsel's statements to claim that the letter setting an administrative hearing on the February 19, 2004 Notice-Order was a "ruse" because the "hearing was never held" on March 9, 2004. Yet, respondent's counsel initiated cancellation of the hearing *by agreement* on the ground that he had already filed suit concerning the same issue to be addressed in the hearing. (R. 19, Exh. A, ¶¶ 8-11.)

Fourth, respondent's irrelevant factual statement attempts to impugn the motives of the City by quoting—without citation—various individuals who spoke during public meetings. But respondent erroneously attributes to the mayor a block quote of comments that were actually voiced by a citizen. (*Compare* Brf. Opp. at 9-10 *with* R. 21, Exh. A, Feb. 19, 2004 Transcript at Sheet 6 (comments of Betty Walters).) Additionally, DVD quotes several statements from certain citizens on an *ad hoc* advisory committee who are neither elected officials nor City employees and who did not participate in drafting Ordinance G-04-10. (*See, e.g.*, Brf. Opp. 10-11.)

Respondent's discussion of select portions of the second evidentiary hearing is misleading on multiple fronts, but ultimately highlights the deep circuit split detailed in the petition.

First, respondent argues that the City "did not rely upon any study that *exclusively* dealt with 'retail' establishments such as DVD." (Brf. Opp. 14.) Of course, this argument begs the question of whether legislative evidence must be specific to a plaintiff's self-defined subcategory of sexually oriented business. (*See* Pet. 17-22) (describing circuit split on this issue).

Moreover, the City did present evidence of secondary effects from retail-only adult bookstores. (*See* Pet. 4-5.) Claiming that the Garden Grove study has "nothing indicating it is *devoted* to retail establishments" (Brf. Opp. 18), respondent attempts to convey the impression that the study did not address retail-only adult bookstores at all. However, the study did include such establishments. (R. 76, Exh. D at 4-5.) Likewise, the Greensboro study relied upon by the City included retail-only adult bookstores. (R. 89, Exh. C at 37; *see also* R. 75 at 11-13 (citing city's reliance upon the secondary effects evidence from retail-only adult bookstores found sufficient in *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004).) This is in addition to studies documenting the adverse effects of "adult bookstores" which the City reasonably concluded includes adult bookstores like respondent. (*See, e g.*, R. 76, Exhs. C-1, C-3, C-4.)

Second, respondent attempts to redefine the City's regulatory rationale (Brf. Opp. 14), but the district court correctly explained what is undisputed: that the Ordinance's purpose is to prevent secondary effects. (App. 23a.) Respondent, in fact, concedes that the City "was *not* advancing the notion that viewing adult materials causes adverse secondary effects." (Brf. Opp. 17-18); *cf. Boos v. Barry*, 485 U.S. 312, 320-21 (1988)

(explaining the difference between primary and secondary effects).

Third, respondent's discussion ignores the wide variety of secondary effects, including adverse impacts on property values, that the Ordinance targets (App. 52a) and instead addresses only crime, repeating its previous mischaracterization of the criminological theory articulated by the City's rebuttal expert. (*Compare* Brf. Opp. 14 *with* Pet. 10) (discussing routine activities theory).

Respondent's argument concerning the City's interest in preventing crime is without merit. Recognizing that New Albany had no sexually oriented businesses when respondent sought to open, respondent cites calls-for-service (CFS) to the police to *non*-sexually oriented businesses in New Albany to show that the City had no basis for regulating sexually oriented businesses. (App. 22a) (noting DVD presented evidence on establishments that sell some adult material in back rooms, but "are *not* regulated by the Ordinance" because they fall below the threshold of sexually explicit material necessary to be qualified as an adult bookstore) (emphasis added). Respondent's argument is plainly irrelevant to whether the City relied on some evidence "reasonably believed to be relevant" to its interest in regulating avowedly sexually oriented businesses like respondent.

Moreover, to the extent that respondent seeks to analogize its 100% adult bookstore to *non*-sexually oriented businesses with adult material behind blinder racks next to cigarettes (*i.e.*, a convenience store) or in a back room (*i.e.*, a neighborhood video store), it

highlights the comparative-analysis issue in the split among the circuits. (Pet. 22-28.)

The Seventh Circuit embraced the *non sequitur* raised by sexually oriented businesses in every secondary effects case, namely that if a given *non*-adult business has greater secondary effects than an adult business, there is no substantial government interest in regulating to prevent the adverse impacts of the adult business. (App. 38a) (holding that 41 arrests for public masturbation at adult bookstore during one-year period do not establish a substantial government interest without a showing that these adverse effects are greater than those at non-adult businesses). *But see, e.g., Flanigan's Enters., Inc. v. Fulton County*, 596 F.3d 1265, 1281 (11th Cir. 2010) (holding that county established substantial government interest in preventing the secondary effects identified at adult businesses "[e]ven if we were to accept that crime is greater in and around the non-adult establishments").

Indeed, respondent's reliance on Dr. Linz's analysis of local CFS data only emphasizes the deep circuit split on the evidence necessary to satisfy the *Renton-Alameda Books* standard. For example, Judge Easterbrook's opinions below (in *Annex Books* and in this case) credit Dr. Linz's testimony in holding that the cities have not compiled sufficient evidence to satisfy that standard. (App. 7a) (alluding to evidence from Dr. Linz "implying that take-home adult stores do not have adverse secondary effects"); (App. 41a) (crediting Dr. Linz's testimony in reversing summary judgment for Indianapolis). But other circuit courts have reached the opposite conclusion. *See, e.g., Doctor John's v. Wahlen*, 542 F.3d 787, 792 (10th Cir. 2008)

(affirming summary judgment on regulation of retail-only adult bookstore and "[I]n light of the Supreme Court's rejection [in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000)] of this specific analysis by Dr. Linz, we see little need to continue."); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 883 n.3 (11th Cir. 2007) ("Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases. *See G.M. Enters., Inc.* [*v. Town of St. Joseph*], 350 F.3d [631] at 635-36, 639 [(7th Cir. 2003)]; *SOB, Inc.* [*v. County of Benton*], 317 F.3d [856] at 863 [(8th Cir. 2003)].").

Similarly, the plaintiffs' evidence in both this case and in *Annex Books* consisted of police calls-for-service (CFS) data. (App. 22a, n.13); *Annex Books, Inc. v. City of Indianapolis*, 333 F. Supp. 2d 773, 786 (S.D. Ind. 2004) (noting that Dr. Linz analyzed police call data), *rev'd in relevant part*, 581 F.3d 460 (7th Cir. 2009) (App. 33a *et seq.*). While Judge Easterbrook's opinions credited this kind of data, other circuits have rejected it as insufficient to undermine municipalities' interest in regulating sexually oriented businesses. *See, e.g.*, *Daytona Grand*, 490 F.3d at 882 & n.31 (discussing survey of leading criminology journals which found that none of the 245 recent articles measuring crime or crime risk used CFS for that purpose).

Fourth, respondent's challenges to Dr. McCleary's testimony (rebutting Dr. Linz) are without merit. For example, Dr. McCleary's entire testimony makes it clear that the City has a valid public safety concern over DVD's proximity to the church across the street any time that people are on the premises. (R. 116, Tr. 167:21-25) (clarifying that his statement concerning

churches is based on the "idea of church worship on Sunday morning, which I assume is a very slow business time for sexually-oriented businesses. *For that reason* the public safety is not relevant. *But when you get into use of the church facility at other periods of time, then public safety issues become relevant*") (emphasis added).

Similarly, respondent mischaracterizes Dr. McCleary's testimony by suggesting that "local criminals" are the City's central concern. Dr. McCleary never referred to "local" criminals, but rather testified that adult businesses of all types, including retail-only adult bookstores, attract both potential victims and predatory criminals from a wide area, *e.g.*, outside the neighborhood. (R. 116, Tr. 168:107.)

Finally, respondent's reference to the 30% threshold for the adult bookstore classification is likewise a red herring. DVD is not a mainstream bookstore seeking to avoid regulation, but is an undisputed adult bookstore whose sole *raison d'etre* is the sale of sexually explicit fare. Indeed, ordinances commonly apply such thresholds (R. 116, Tr. 168:14-169:13), and thereby avoid vagueness claims frequently raised against less precise definitions. *See, e.g., Wisconsin Vendors, Inc. v. Lake County*, 152 F. Supp. 2d 1987 (N.D. Ill. 2001).

3. Respondent's discussion of *Alameda Books* is equally unavailing because it neither denies the existence of the circuit split compelling this Court's review nor shows that the Seventh Circuit's decision is correct under that case.

Contrary to respondent's suggestion, *Alameda Books* does not require municipalities to affirmatively prove causation of secondary effects. Rather, *Alameda Books* reaffirmed *Renton's* central holding "that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." 535 U.S. at 438 (plurality opinion); *id.* at 535 at 451 (Kennedy, J., concurring in judgment). Similarly, *Alameda Books* refused to require municipalities to "bear the burden of providing evidence that rules out" alternate explanations of secondary effects. *Id.* at 437 (plurality opinion).

Nor does *Alameda Books* require evidence that adult establishments produce a greater amount of crime than non-adult establishments. First, the language that respondent quotes comes from the plurality's description of the Ninth Circuit's decision, not from a prescriptive rule of law. 535 U.S. at 436. Nothing in the plurality opinion suggests that sexually oriented businesses must be proven to have the *most* crime problems in a municipality in order for the municipality to justify regulations designed to prevent such businesses' secondary effects. Yet, as noted in the petition, a circuit split has developed over this issue and requires resolution by this Court. (Pet. 22-28.)

Finally, respondent's closing reminder that the remand order gives the City a "second bite at the apple" is an implicit concession that the Seventh Circuit created a new legal standard, because the district court *already conducted a full evidentiary hearing* under the "reasonably believed to be relevant" standard established in *Renton* and reaffirmed in

Alameda Books. After the evidentiary hearing, the district court concluded:

> The City has established through this evidence the first prong of the *Renton* test for the following reasons. First, the Ordinance states that its purpose is to prevent a wide variety of harms that sociological and criminological studies tend to demonstrate are associated with sexually oriented businesses. . . . Second, the studies relied upon by the City in enacting the Ordinance are relevant to the problem of regulating secondary effects, such as crime. . . . Under the *Alameda Books* test, DVD neither demonstrates that the City's evidence does not support its rationale nor does it dispute the factual findings of the many studies relied upon by the City.

(App. 23a-24a.)

Conspicuously absent from the Seventh Circuit's decision below—as well as from the *Annex Books* decision on which it relies *and* respondent's brief in opposition—is any mention of this Court's "reasonably believed to be relevant" standard. Because the decision below jettisoned that standard in favor of much more rigorous requirements for secondary effects ordinances, this Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 24, 2010

MOTION FILED

MAR 19 2010

(2)

No. 09-1027

In the Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,

Petitioner,

v.

NEW ALBANY DVD, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* INDIANA FAMILY INSTITUTE, INDIANA AMERICAN FAMILY ASSOCIATION, CITIZENS FOR COMMUNITY VALUES, CORNERSTONE POLICY RESEARCH, DELAWARE FAMILY POLICY COUNCIL, FAMILY FOUNDATION, FAMILY POLICY COUNCIL OF WEST VIRGINIA, FLORIDA FAMILY POLICY COUNCIL, GEORGIA FAMILY COUNCIL, LIBERTY INSTITUTE, LOUISIANA FAMILY FORUM, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN AND FAMILIES, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, SOUTH DAKOTA FAMILY POLICY COUNCIL, WISCONSIN FAMILY COUNCIL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

By March 18, 2010, *amici curiae* Indiana Family Institute, Indiana American Family Association, Citizens for Community Values, Cornerstone Policy Research, Delaware Family Policy Council, Family Foundation, Family Policy Council of West Virginia, Florida Family Policy Council, Georgia Family Council, Liberty Legal, Louisiana Family Forum, National Coalition for the Protection of Children and Families, New Jersey Family Policy Council, North Carolina Family Policy Council, Oklahoma Family Policy Council, Pennsylvania Family Institute, South Dakota Family Policy Council, and Wisconsin Family Council, as required by Sup. Ct. R. 37.2(a), notified both Petitioner's counsel and Respondent's counsel of its intent to file this brief *amici curiae*. Petitioner's counsel consented to this filing, but Respondent's counsel did not. Consequently, *amici* move this Court, pursuant to Sup. Ct. R. 37.2(b), for leave to file this brief of *amici curiae*.

Amici, as described below, are not for profit organizations that seek to benefit families, children, and their communities. They are concerned about the secondary harms associated with adult businesses including crimes that affect families and children, sexually explicit materials in the hands of children, and the effect of such businesses on communities (including property values). Numerous of the *amici* organizations produce reports and regularly advocate before state

and local governments for the need of adult business regulations or litigate to protect communities from the secondary harms of such businesses.

Amici request leave to file this brief to communicate their concern that the decision of the United States Court of Appeals for the Seventh Circuit strays from this Court's established caselaw and will undermine the ability of municipalities to effectively deal with negative secondary effects. Given the work of *amici* and their perspective from particularized experience advocating for families and children by seeking regulation of adult businesses this Court should grant leave to file this brief of *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

Amici are numerous tax-exempt organizations with memberships in various states that share a common concern over the impact of public policies on families and family life. In particular, these organizations recognize that the negative secondary effects of adult businesses can have a serious impact on families. They wish local government to be able to appropriately regulate adult businesses to limit such negative effects as crime affecting families, the deterioration of neighborhoods (including decreased property values), and the exposure of sexually explicit materials to children. Many of the *amici* have for years regularly advocated before both state and local governments for policies, like these, that serve our families. Their collective work has included policy reports, education, testimony before governmental bodies, and even litigation. *Amici* submit this brief in support of Petitioner, City of New Albany.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *amici's* intention to file this brief. Petitioner's counsel consented to this filing, but Respondent's counsel did not. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or part, and that no person or entity, other than the Alliance Defense Fund or one of the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The United States Court of Appeal for the Seventh Circuit departed from established caselaw and instituted a rule that is unworkable for municipalities and that undermines the ability of municipalities to protect their communities from the negative secondary effects of adult businesses. *Amici* pro-family organizations urge this Court to grant New Albany's writ of certiorari so that municipalities can continue to enforce modest but necessary regulations aimed at the secondary effects of such businesses.

Despite the characterization of the court below, significant harm arises out of adult businesses, including retail-only adult bookstores. Numerous cases from various circuits have recognized the negative secondary effects of retail-only adult bookstores and upheld local ordinances. The Seventh Circuit, however, applied a heightened level of scrutiny to adult business regulations, despite caselaw from this Court that gives appropriate leeway to municipalities to craft solutions to significant problems. The new approach taken by the Seventh Circuit will make it extremely costly and difficult for municipalities to adopt appropriate regulations, even simple limitations on the location of adult businesses. Because of the significance of the negative secondary effects of sexually oriented businesses, this Court should grant New Albany's writ of certiorari so that municipalities can continue to rely on clear direction from this Court.

ARGUMENT

I. Municipalities serve their communities best when they are able to limit the negative secondary effects of adult businesses, including the effects of retail-only adult bookstores and video stores.

This Court has long observed the negative secondary effects associated with adult businesses. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (recognizing that adult businesses can "damage the value and the integrity of a neighborhood") (Kennedy, J. concurring); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Despite the general recognition of harm, the court below suggested that there is little evidence of harm from retail-only adult bookstores and video stores. On the contrary, evidence of harm abounds.

The Ninth Circuit Court of Appeals in *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004), was confronted with a case involving retail-only adult businesses and recognized the evidence of harm that comes from such businesses. While World Wide Video complained that none of the studies relied on by Spokane to justify their restrictions related to retail-only businesses, *see id.* at 1190, 1197, the court pointed to an abundance of evidence including "citizen testimony concerning pornographic litter and public lewdness," *id.* at 1195. The court recognized that this was sufficient

to justify the ordinance. *See id.* But the evidence was significantly more detailed. In fact, persons "witnessed various criminal acts in and around World Wide's stores, including prostitution, drug transactions, public lewdness, harassment of citizens by World Wide's clientele, and pervasive litter, including used condoms, empty liquor bottles, and video packaging featuring graphic depictions of sexual acts." *Id.* at 1190 n.6. For instance, "a pedodontist working in a building less than a block away from a retail-only store complained of pornographic litter, harassment of female employees, vandalism, and decreased business, all resulting from his proximity to the retail-only store." *Id.* at 1197. Finally, testimony that retail only stores have "economic and aesthetic impacts upon neighboring properties" was provided by Spokane. *Id.* at 1197-98.

This was not the only Circuit Court decision to recognize negative secondary effects to retail-only adult businesses. In *H & A Land Corp. v. City of Kennedale, Tex.*, 480 F.3d 336 (5th Cir. 2007), the Fifth Circuit examined evidence of such harm. One study, conducted by Indianapolis in 1984, polled members of the American Institute of Real Estate Appraisers. "Eighty percent of the respondents predicted that an adult bookstore would negatively impact residential property values, and seventy-two percent believed commercial property value would also be negatively [a]ffected." *Id.* at 340. "29% believed such an establishment would attract 'undesirables' to the neighborhood" and "14% felt it would create a bad image of the area" when asked

to explain the negative impact. *Id.* "*These reasons are equally applicable to an on-site or off-site establishment....*" *Id.* (emphasis added). Another study, by Oklahoma City, surveyed real estate appraisers in that city. "Seventy-four percent predicted a negative impact on real estate value in the surrounding area." *Id.* Based on this evidence, the court upheld an ordinance regulating the location of adult bookstores.

Likewise, the Eighth Circuit in *ILQ Invs., Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), recognized the harm "specifically attributable to adult bookstores...." *Id.* at 1417-18. The court also cited the Indianapolis study and pointed out that adult bookstores project a negative effect on property values a considerable distance from their stores. *See id.* at 1418. The Eighth Circuit also cited a St. Paul study that documented "discarded pornographic literature allegedly found in the streets, sidewalks, bushes and alleys near adult businesses. Such literature is sexually very explicit, even on the cover, and...becomes available to minors even though its sale to minors is prohibited." *Id.* The court upheld the ordinance. *See id.* at 1415.

The Tenth Circuit in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), also relied on the Oklahoma City study and the Indianapolis study, which stated, "even relatively...passive use[s] such as...adult bookstore[s] ..have a serious negative effect on

their immediate environs." *Id.* 687 n.1. The court upheld the ordinance based on this evidence.

The foregoing evidence from *World Wide Video* (9th Cir.), *ILQ Investments* (8th Cir.), and *Z.J. Gifts* (10th Cir.), is particularly relevant because the New Albany City Council explicitly relied upon these decisions and the evidence from these communities. *See* Pet. App. 87a-89a.

State courts have also recognized problems with adult bookstores. For instance, in *People ex rel. Deters v. Lion's Den, Inc.*, No. 04-CH-26 (Ill. Cir. Ct., 4th Cir., Effingham County July 13, 2005), *aff'd* No. 5-05-0413 (Ill. App. Ct. July 28, 2006), *pet. for leave to appeal denied*, 861 N.E.2d 663 (Ill. 2006) (table)[2], an Illinois state trial court enjoined a retail only adult bookstore from being located within a certain distance from a park and a cemetery after evidence of negative secondary effects. In particular, there was litter in the vicinity of the store near the park and cemetery including sexuality explicit magazines and toys. *Id.* at ¶¶ 26-27. The community significantly decreased their use of the park after the opening of the adult bookstore, even by campers and baseball leagues, at least in part due to concerns over safety. *Id.* at ¶¶ 28-29.

That court also credited Dr. Richard McCleary's research, who also testified on New

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[2] The relevant portion of the 43-page order is attached as Appendix A.

Albany's behalf, which showed that "sexually-oriented businesses, including retail-only adult bookstores, pose substantively large and statistically significant crime hazards." *Id.* at ¶ 31. Dr. McCleary advocated the use of

> buffer zones as a means of regulating adult uses...explain[ing] that the relationship between sexually-oriented businesses and crime applies to all business sub-classes, including adult book and video stores that rent or sell materials for off-premises use, and that a principal means of minimizing the crime-related public safety risk is to create distance between the sites and sensitive uses.

Id. at ¶ 32. Dr. McCleary testified that customers of such businesses attract criminals to the areas surrounding such businesses since the customers are strangers to the area, carry significant cash, and, due to concerns about anonymity, do not tend to report crime. As a result, robbery, auto theft, and vandalism increase in those areas. *Id.* at ¶ 33.

Common sense is consistent with the evidence credited by these various courts. Although the Seventh Circuit insisted that it was "paternalistic" to restrict adult businesses due to concerns about customer safety, *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 560 (7th Cir. 2009), such a criticism does not render an ordinance unconstitutional. If it did, most laws,

which are paternalistic in one respect or another, would be unconstitutional. More important, customer safety is not the only concern. Instead, once criminals are attracted to an area, the crime that they bring will not be limited to customers. Therefore, even without conducting additional studies, it is sensible to limit the location of such businesses and prevent them from bringing crime to areas where any victims would congregate—such as residential areas.

Similarly, few would desire to move near an adult bookstore regardless of whether or not it also has peep show booths. Most potential residents would not know what is inside the store when making their assessment of whether to move into an area. A store's presence in a residential or even a commercial area is problematic regardless of what goes on inside. Adult businesses also reflect unfavorably on surrounding commercial enterprises. Therefore, the presence of an adult business is likely to reduce both residential and commercial property values, consistent with the above studies.

Finally, it is hardly "paternalistic" in a pejorative sense for a municipality to look out for the welfare of the children in its community. Even apart from studies linking such businesses with crime (crime that also affects children), concerns about sexually explicit litter is relevant when children are involved. *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing the appropriateness of regulations to limit access

by children to sexually explicit materials). Government plays a vital role in limiting the negative secondary effects of sexually oriented businesses—here by simply controlling the location of such enterprises. Its interest should not quickly be brushed off as imagined in light of the pervasive nature of secondary effects, even for the Respondent's self-defined sub-category of adult bookstore.

II. The Seventh Circuit decision undermines the ability of municipalities to protect against these harms.

This Court stated that significant leeway should be given to municipalities in assessing and responding to harm. The decision below, however, strays from this standard and prevents municipalities from relying on the kinds of evidence described above.

A. The court below strayed from this Court's caselaw.

According to *Renton*, *supra*, restrictions aimed at the negative secondary effects of adult businesses are "acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. The Court emphasized that municipalities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.*

at 52 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)).

In *Alameda Books*, *supra*, Justice Kennedy's concurrence reiterated *Renton*'s central themes, including the proposition "that a city must have latitude to experiment" when regulating to prevent secondary effects and "that very little evidence is required." *Alameda Books*, 535 U.S. 425, 451 (Kennedy, J., concurring in judgment). While the plurality cautioned that municipalities cannot rely on "shoddy data or reasoning," *id.* at 438 (plurality opinion), all members reaffirmed *Renton*'s deferential standard, *see id.* at 438 (plurality opinion), 451 (Kennedy, J., concurring in judgment).

In contrast, the Seventh Circuit imposed a new rule requiring a more searching inquiry into the assessment of harm. Notwithstanding the voluminous evidence in New Albany's record, the court suggested that the city "has not established that book and video stores offering only take-home items cause any untoward secondary effects" and claimed that this Court in *Renton* and *Alameda Books* "held that proof of such effects is essential if municipalities regulate adult establishments differently from the way they regulate other similar businesses...." *New Albany DVD*, 581 F.3d at 559.

This Court, however, refused to set a "high bar for municipalities that want to address *merely* the secondary effects of protected speech" and held

"that a municipality may rely on *any* evidence that is '*reasonably believed* to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Alameda Books*, 535 U.S. at 438 (citing *Renton*, 475 U.S. at 51-52) (plurality opinion) (emphasis added). The plurality went on to cite Justice Souter's concurrence *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), for the proposition that a municipality may use "evidence that *adult theaters* are correlated with harmful secondary effects to support its claim that *nude dancing* is likely to produce the same effects...." *Id.* at 584 (plurality opinion) (emphasis added).

Despite the Seventh Circuit's assertion, therefore, this Court approves of relying on harm from one subclass of adult business to regulate another subclass. New Albany, however, was even more careful and presented evidence of the harms *unique* to retail-only adult businesses, including the evidence described above from *World Wide Video, supra, ILQ Investments, supra,* and *Z.J. Gifts, supra* and the Indianapolis, Oklahoma City, and St. Paul studies. The City also presented studies from Garden Grove, California; Austin, Texas; Whittier, California; and Amarillo, Texas; and an expert report from Dr. McCleary stating that the "on-premise" versus "take-home only" distinction "is irrelevant to measuring the public safety risk posed by" adult businesses. *See* Pet. App. 10, 82a, 88a-89a.

In spite of the extensive evidence presented by New Albany and this Court's caution that "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners," *Alameda Books*, 535 U.S. at 451 (citing *Renton*, 475 U.S. at 51-52) (Kennedy, J., concurring in judgment), the Seventh Circuit determined that there was not sufficient proof of harm from Respondent's sub-category of adult bookstore. *See New Albany DVD*, 581 F.3d at 559-60. Glossing over the City's abundant evidence, evidence that was sufficient for numerous other courts faced with the identical issue, *World Wide Video* (9th Cir.), *ILQ Investments* (8th Cir.), and *Z.J. Gifts* (10th Cir.), the Seventh Circuit mischaracterized this proof as insufficiently broad, *see New Albany DVD*, 581 F.3d at 559, or based only on anecdotes, *see id.* at 560. This Court, however, not only recognized that courts should not second-guess "fact-bound empirical assessments of city planners," *Alameda Books*, 535 U.S. at 451-52, but it recognized that reliance on the "experience of" others is appropriate, *Renton*, 475 U.S. at 50.

Similarly, the Ninth Circuit in *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003), recognized that legislative type bodies may rely on testimonial and anecdotal evidence due to the "nature of the legislative process." *Id.* at 1168.

> A legislative body can act without first acquiring irrefutable proof. In other words, lawmakers need

> not bury each piece of described trash before acting to combat litter, or confirm each honking horn before acting to abate noise levels. Instead, a legislative body, acting in furtherance of the public interest, is entitled to rely on whatever evidence it reasonably believes to be relevant to the problem at hand.

Id. (quoting *Nat'l Amusements Inc. v. Town of Dedham*, 43 F.3d 731, 742 (1st Cir. 1995)).

The wisdom of deferring to the factual assessments of municipalities is demonstrated by the problems that occur when courts do not. Here the Seventh Circuit's second-guessing of New Albany's legislative judgment lead to misconstruing the legislative evidence. The court completely ignored the adverse impact of adult bookstores on property values, which, as recognized in the *H & A Land Corp.* decision, 480 F.3d at 340, applies equally to retail-only adult bookstores as well as to adult bookstores with peep show booths. The court improperly considered the effects of litter to be insufficient, although the same evidence relied upon by New Albany was considered adequate by other circuits. The court also misunderstood the safety argument, implying that city planners should not separate adult bookstores from places where families congregate because potential victims of crimes can make their own assessments of risk. *See New Albany DVD*, 581 F.3d at 560. Moreover, the Seventh Circuit ignored

the fact that once crime is brought to an area, it spills over to the community at large. *See, e.g., Lion's Den*, ¶ 33.

In concluding that the City's evidence was not sufficient, the Seventh Circuit essentially created a new—and substantially more onerous—evidentiary burden. Instead of considering reliance on studies from other municipalities to be sufficient, *see Renton*, 475 U.S. at 50 (finding the requirement of "studies specifically relating to the particular problems" of a municipality to be "an unnecessarily rigid burden"), the effect of the Seventh Circuit's decision is to demand just the opposite, local evidence. In fact, the court explicitly stated that it is "necessary to know how serious the problem is...in New Albany." *New Albany DVD*, 581 F.3d at 561. The Seventh Circuit suggested that New Albany should conduct an extremely specific, empirical study:

> There are thousands of adult bookstores; it should be easy to find out how much litter they generate, how much of this litter falls into the hands of minors, and whether this is a materially greater problem when one store carries 40% adult books than when lots of stores carry 10% apiece.

Id.

Even if such an empirical study were possible—when Respondent opened, there were no

adult businesses in New Albany—it would be prohibitively expensive to determine specific causation at such a detailed level, and, more important, no study could be done until after the city suffered secondary effects. Small cities do not tend to regulate based on statistics from a single business but based on broader experience elsewhere. Injecting a new burden to conduct an empirical study is directly contrary to the direction of this Court. *See Renton*, 475 U.S. at 50 (disagreeing with the Court of Appeals that "the city's justifications for the ordinance were 'conclusory and speculative' in the absence of "studies specifically relating to 'the particular problems or needs of Renton'"); *Alameda Books*, 535 U.S. at 437-38 (rejecting adult bookstore's argument that the city must perform additional empirical studies to establish nexus between combination adult businesses and crime) (plurality opinion). Indeed, the "First Amendment does not require a city...to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed* to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52 (emphasis added).

Not only did the Seventh Circuit suggest additional local studies, but fearing that speech would be curtailed by merely using the zoning power to restrict the location of such businesses, it stated that the City's interest in preventing sexually explicit litter within a certain distance from other uses, such as residences, can only be

sustained if it can be shown how much litter is produced, who is going to see the litter where such businesses are allowed to operate, and how much litter will remain after regulation. *See New Albany DVD*, 581 F.3d at 561. Not only does this Court not require that level of evidence, but neither does common sense. If sexually explicit litter is found in the proximity of such businesses and if such businesses are moved away from residential areas, it stands to reason that such litter will no longer plague residential areas.

B. The Seventh Circuit's error extends to *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), referenced into the decision below.

The full extent of the Seventh Circuit's departure from this Court's caselaw is found in its *Annex Books* decision, adopted by reference into the decision below seven days after *Annex Books* was filed. *See New Albany DVD*, 581 F.3d at 560-61. The *Annex Books* court insisted that "the City needs evidence that the restrictions actually have public benefits great enough to justify any curtailment of speech." *Annex Books*, 581 F.3d at 462.

The decision in *Annex Books* undermines time, place, and manner restrictions for all types of adult businesses, not just location requirements affecting retail-only adult bookstores. First, the court demanded exacting evidence, finding fault

that "[n]one of the studies...concerns" evidence of specific harm arising out of the hours of operation of adult businesses. *Annex Books*, 581 F.3d at 462-63. Such specificity is not required by this Court's caselaw.

Second, it was not even sufficient to show that there were 41 arrests in a single year for public indecency at an adult bookstore. Instead, according to the court, it was necessary to show that "most of them" occurred during the hours sought to be regulated. *Id.* at 463. Therefore, merely reasoning that there are numerous arrests and that it is harder to police such activities under the cover of darkness is not enough to satisfy the Seventh Circuit's heightened scrutiny.

Third, the court requires municipalities to engage in scientific, comparative analysis, showing that adult businesses are more harmful to the city than bars. *Id.* The issue, however, is not the overall number of arrests at different kinds of businesses, but the extent to which harms can be eliminated in any given context. While this Court requires a city to submit that a law "may reduce the costs of secondary effects," *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring in judgment), there is no duty to engage in comparative analysis to determine whether adult businesses are more or less safe than bars.

None of these new requirements turn on the subclass of adult business being regulated. Instead, these additional evidentiary standards require

endless permutations of evidence even when there are known secondary effects. Because of the breadth of what is demanded, the court's new requirements jeopardize enforcement of all adult business regulations.

C. If New Albany's extensive evidence is insufficient, then municipalities' efforts at protecting against adult businesses will be undermined.

If the decision below is allowed to stand, then contrary to the direction of this Court, lower courts will constantly second-guess the "fact-bound empirical assessments" of local governments, *Alameda Books*, 535 U.S. at 451-52 (Kennedy, J., concurring in judgment), requiring endless numbers of studies and reports to demonstrate that each unique subclass of adult business causes harm greater than non-adult businesses and that the regulation is certain to correct the problem. Municipalities cannot be expected to meet such an onerous and unreasonable burden. Instead, many municipalities will simply cease to regulate. Ultimately, it is necessary that this Court address this issue to properly balance competing interests and return certainty to the law so that municipalities can regulate the location of adult businesses to separate the secondary effects they generate from sensitive areas and families who congregate there.

1. Municipalities will not be able to comply with this new burden.

The practical demands of local regulation prevent municipalities from focusing on endless numbers of individualized situations. Instead, local governments typically attempt to regulate comprehensively due to related harms and in a way that generally benefits the community—even if regulation may not be necessary for each and every individual or person affected.

The same is true with regards to adult business regulations. Typically a municipality does not regulate only adult bookstores or only nude dancing, but seeks to limit the harms common to sexually oriented businesses. Regulations, however, would be nearly impossible if local governments were forced to break down their regulations according to endless subclasses of adult businesses based on ever-varying industry practices. The Seventh Circuit's standard suggests that endless studies must be done of any subset of admittedly adult businesses that may challenge an ordinance. Based on this notion, entirely new studies would need to be done in each municipality.

The Sixth Circuit recognized the error in this approach:

> Requiring local governments to produce evidence of secondary effects for all categories created by every

> articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence "reasonably believed to be relevant." *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728 (stating that the city need not demonstrate that "adult department stores" produce the same secondary effects as "adult minimalls")...

Richland Bookmart, Inc. v. Knox County, Tenn., 555 F.3d 512, 526 (6th Cir. 2009). The *Richland Bookmart* court also cited a prior Seventh Circuit case, *G.M. Enters. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir. 2003), for the same proposition.

Ultimately municipalities would not be able to regulate comprehensively because even if they had studies about the effect of adult theaters, for instance, they may not have evidence of the effects of nude dancing. However, this Court has recognized that it is appropriate to rely on evidence from other kinds of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion) (citing *Barnes*, 501 U.S. at 584-85 (Souter, J., concurring in judgment)). Justice Souter explained in *Barnes* that the

> type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live

> nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects.... Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case.

Barnes, 501 U.S. at 584 (Souter, J., concurring in judgment).

Pursuant to the Seventh Circuit opinion, however, municipalities are essentially being asked to provide additional and specific evidence of harm and, by extension, to continue to re-litigate the issue of whether it is good enough. Moreover, if the extensive evidence of harm compiled by New Albany is not sufficient, the message to municipalities is clear: regulation is untenable. The end result is that communities are forced to suffer the negative secondary effects of adult businesses.

2. Many municipalities will cease to regulate due to fear of litigation.

The decision of the Seventh Circuit raises the specter of uncertainty and costly litigation to municipalities who wish to regulate. Unless a municipality is certain that a court will view their

evidence in the same way that they do, many municipalities will cease to regulate.

While municipalities should be able to rely on others' experience, *see Renton*, 475 U.S. at 51, New Albany was not able to do so. Instead, the experiences of other cities, which were adequate for other Circuit Courts, *see World Wide Video* (9th Cir.), *supra, H&A Land Corp.* (5th Cir.), *supra, ILQ Investments* (8th Cir.), *supra, Z.J. Gifts* (10th Cir.), *supra*, and *Richland Bookmart* (6th Cir.), *supra* were deemed insufficient by the Seventh Circuit. If New Albany and other cities cannot rely on studies, anecdotal evidence, judicial findings, and expert testimony previously deemed sufficient by courts, cities are likely to refrain from regulations while their citizens bear the burden of the court induced inaction.

D. The Seventh Circuit's rule does not properly balance the competing interests.

A more stringent standard, such as the rule developed by the Seventh Circuit, is not well suited to balancing First Amendment interests with the evident harms of adult businesses. This Court has been clear that unlike with core political speech, only the outside limits of the First Amendment are implicated by regulation of businesses specializing in sexually explicit fair. *See, e.g., City of Erie v. Pap's A.M* , 529 U.S. 277, 289 (2000) (stating that nude dancing "falls only within the outer ambit of the First Amendment's protection") (plurality

opinion); *Barnes*, 501 U.S. at 565-66 (finding nude dancing to be "only marginally" within "the outer perimeters of the First Amendment") (plurality opinion); *American Mini Theatres*, 427 U.S. at 70 ("society's interest in protecting" materials that are "erotic" and "arguably artistic" is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate") (plurality opinion).

Since the harms of adult businesses are significant and since the interests of adult businesses have little to do with "having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause," *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968), the best course of action is to give municipalities latitude and deference in assessing secondary effects and crafting solutions. Since even core political speech can be limited by reasonable place restrictions, this Court should take the opportunity to reaffirm that local governments may protect their citizens by limiting the locations of adult businesses based on some evidence "reasonably believed to be relevant to the problem that the city addresses," *Renton*, 475 U.S. at 51-52. Otherwise we may be faced by the anomaly that adult businesses, which are only protected by the outside limits of First Amendment, receive more protection than core political speech.

E. Municipalities and the communities they protect need the clarity of a reaffirmation of *Renton*.

Municipalities need direction from this Court in order to protect their communities from negative secondary effects of adult businesses. They need clarity, stability, and a common sense standard like that of *Renton*.

Without clarity, municipalities constantly risk litigation. As stated above, the cost of litigation and the risk of loss will drive many municipalities to back down and fail to protect their residents. Not only is clarity needed, but so is stability. Municipalities for decades have built their ordinances around an understanding that *Renton* is the controlling standard. This standard cannot change without bringing harm to those municipalities that relied on the *Renton* rule. *See Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (stating that the "inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application"). In fact, not only are municipalities relying on this rule, but numerous states have laws regulating the secondary effects of adult businesses.[3] If the Seventh Circuit's decision

[3] Various states have adopted laws regarding distances from adult businesses *See* Ariz. Rev Stat § 13-1422(A), O C G A § 36-60-3; 65 Ill. Comp Stat 5/11-5-1 5, N J. Stat Ann § 2C.34-7, S.D C L § 11-12 2, Tenn Code Ann § 7-51-1407(a)(1).

were allowed to stand, state and local governments would no longer have the benefit of consistency and predictability in this area of the law but may actually be forced to repeal laws until a clear rule is announced.

Municipalities would benefit from a reaffirmation of the core principles of *Renton*, namely: 1) that municipalities can rely on any evidence "reasonably believed to be relevant," 475 U.S. at 51-52, 2) that they can rely on what was "already generated by other cities," *id.* at 51, 3) that no study needs to be particularized to the municipality itself, *id.* at 50, and 4) that the evidence need not be an exact match to the situation at hand, *Alameda Books*, 535 U.S. at 438 (plurality opinion). This will renew the straightforward rule on which municipalities have relied for years.

CONCLUSION

For the foregoing reasons, your *amici* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: March 19, 2010

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APPENDIX 1

EXCERPT FROM:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT EFFINGHAM COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* EDWARD C. DETERS, State's Attorney of Effingham County, **Plaintiff,** **vs.** **THE LION'S DEN, INC., a foreign business corporation incorporated in the State of Ohio; EFFINGHAM RETAIL 27, INC., a foreign business corporation incorporated in the State of Ohio; MICHELLE MOORE; and REAL ESTATE located at 401 Frontage Road, in the Village of Montrose, Effingham County, Illinois,** **Defendants.**	No.. 04-CH-26 **MODIFIED PERMANENT INJUNCTION ORDER**

FILED: July 13, 2005

***

E. Evidence of impact on surrounding vicinity

24. Ms. Woolridge testified that the principal clientele of the Lion's Den store in Montrose, Illinois, are truck drivers coming off Interstate 70. She further testified that customers frequently are allowed to view sexually explicit DVDs in the store on the manager's computer monitor. Ms. Woolridge indicated that on two occasions she was sexually propositioned by customers while working at the store, once in the late summer, 2003, and once in March, 2004. She also testified that on one occasion she had to run off two customers whom she suspected of engaging in sexual activity in a truck parked in the store's parking lot. She stated that store management discouraged her from reporting such incidents to the state police. Although her employment at the Lion's Den store had been terminated, Ms. Woolridge was a credible witness.

25. Ron Kilman, an investigator for the Effingham County State's Attorney's Office, provided credible testimony regarding his investigation of the Lion's Den store in Montrose, Illinois. On April 26, 2004, he entered the store and purchased various sexually explicit items, which he stated were typical of the items offered for sale there. These items were admitted into evidence as Plaintiff's Exhibits 1, 2, 3, 4 and 5. Also admitted into evidence, as Plaintiff's Exhibits 6 and 7, were the receipt and return policy he received from the store.

26. Some time later, approximately three weeks prior to the hearing on July 1, 2004, Mr. Kilman returned to and observed the areas surrounding the Lion's Den store in Montrose, Illinois. In the drainage ditches along the roadways near the store, in close proximity to the Village of Montrose Park and Montrose Cemetery, Mr. Kilman found numerous items of litter, including sexually explicit magazines and sex toys, which had been sold at the Lion's Den store. These items were admitted into evidence as Plaintiff's Exhibits 9 through 18. Mr. Kilman also took 6 photographs of the Lion's Den property from the Village of Montrose Park and Montrose Cemetery, which were admitted into evidence as Plaintiff's Group Ex. 8.

27. Barb Gillam, a resident of Montrose for the past 10 years, has openly expressed her disapproval of the Lion's Den store, but she provided credible testimony that she found several items of litter from the store in or near the Village of Montrose Park and Montrose Cemetery. These items were admitted into evidence as Plaintiff's Exhibits 20, 21, 22 and 23. On June 17, 2004, she found Plaintiff's Ex. 20, a sexually explicit magazine, in a trash can in the park near where the children's playground equipment is located. On August 21, 2004, she found Plaintiff's Exhibits 21, 22 and 23 in a roadway ditch near the cemetery. Plaintiff's Ex. 21 consists of two magazines containing numerous full-frontal photographs of nude men, some displaying erect penises. Plaintiff's

Exhibits 22 and 23 are sexually explicit video tapes.

28. Lylah Flach, a resident of rural Montrose, testified that her family had frequently used the Village of Montrose Park prior to. the opening of the Lion's Den store, but due to her concerns for the safety of her children, she no longer permits them to do so, because of the close proximity of the store.

29. Dennis Fletcher, who is the president of the Village of Montrose, as well as the caretaker of the Village of Montrose Park, provided credible testimony that there has been a marked decline in the public's use of the park, including the cancellation of organized baseball leagues and a substantial reduction in usage by campers, since the Lion's Den store began operations. Similar observations were made by Mrs. Gillam and Mrs. Flach.

F. Secondary effects of adult entertainment facilities

30. Dr. Richard McCleary, an expert witness hired by the Plaintiff, testified regarding the secondary effects of crime and public safety risks associated with sexually-orientated businesses. Dr McCleary is a professor of social ecology at the University of California-Irvine, where he holds joint appointments from the Department of Criminology and the Department of Planning, in which he teaches graduate level courses. He also

sits on the boards of several leading journals in the field of criminology. He has a Bachelor of Science in mathematics from the University of Wisconsin, a Master of Arts in statistics from Northwestern University, and a Ph.D. in sociology from Northwestern University. His curriculum vitae was admitted into evidence as Plaintiffs Exhibit 25A.

31. Dr. McCleary testified that scientific research (including his own) consistently shows that sexually-oriented businesses, including retail-only adult bookstores, pose substantively large and statistically significant crime hazards. He personally has conducted research on this issue since 1977. His testimony was credible and convincing.

32. As to the issue of using buffer zones as a means of regulating adult uses, Dr. McCleary explained that the relationship between sexually-oriented businesses and crime applies -to all business sub-classes, including adult book and video stores that rent or sell materials for off-premises use, and that a principal means of minimizing the crime-related public safety risk is to create distance between the sites and sensitive uses.

33. In addressing crime as a secondary effect of sexually-oriented businesses, Dr. McCleary explained why patrons of such establishments are considered, from a criminological perspective, to be "soft targets" for predatory criminals. Patrons of erotic businesses generally come from outside the

area and thus are strangers to the local vicinity, they take steps to maintain anonymity (i.e., they often carry large amounts of cash for purchases), and are more reluctant to report victimization. Dr. McCleary testified that the presence of soft targets draws criminals who commit predatory crimes (robbery, auto theft, vandalism, etc.) and crimes of opportunity, and that potential victimization extends beyond the immediate site into the surrounding area.

34. Dr. McCleary based his opinions, in part, on numerous prior studies which have documented the adverse secondary effects of sexually-oriented businesses. Those studies included the following cities, reports from which were admitted into evidence: Amarillo, Texas (Exhibit 27); Whittier, California (Exhibit 28); Phoenix, Arizona (Exhibit 29); Minneapolis, Minnesota (Exhibit 30); Indianapolis, Indiana (Exhibit 31); Austin, Texas (Exhibit 32); Garden Grove, California (Exhibit 33); Centralia, Washington (Exhibit 35); and St. Paul, Minnesota (Exhibit 36).

35. The Garden Grove study (Exhibit 33) was personally conducted by Dr. McCleary, along with James Meeker, J.D., Ph.D. Together they examined the crime rates both before and after a sexually-oriented business opened its doors. They found a sixty-five to seventy percent increase in serious crime following the opening of a sexually-oriented business.

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MOTION FILED

MAR 2 2 2010

No. 09-1027

In The
Supreme Court of the United States

CITY OF NEW ALBANY, INDIANA,
Petitioner,

v.

NEW ALBANY DVD, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The International Municipal Lawyers Association ("IMLA") urges this Court to grant it leave to appear in this case as *amicus curiae* in support of Petitioner, the City of New Albany, Indiana.[1] At stake in this case is the essential right of all municipalities to zone sexually oriented businesses to locations that are away from houses of worship, parks, schools, residences, and other sexually oriented businesses.

IMLA is a nonprofit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no part of this brief was authored by counsel for either party. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received notice at least 10 days before the due date of this brief. The City's written consent to the filing of this brief is filed with the Clerk's office. DVD objects to the filing of this brief, and therefore, *amicus curiae* files this motion for leave to appear in this case.

in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA's local government members are the entities most-affected by federal appellate court decisions involving the regulation of sexually oriented businesses and their secondary effects. Local governments are the entities charged with the duty of responsibly governing the communities within which sexually oriented businesses are located, and they are responsible for addressing the adverse secondary effects that these businesses create. Thus, IMLA has a compelling interest in the development of the law governing the regulation of sexually oriented businesses. The subject of this case -- the evidentiary burden that a local government must meet in order to enact an ordinance that zones sexually oriented business uses -- is, therefore, of the utmost importance to IMLA and its members.

When adopting its zoning regulations prohibiting sexually oriented businesses from operating within certain distances from each other and from houses of worship, parks, schools, and residences, the City relied upon numerous studies, reports, testimony, judicial decisions, eyewitness observation, and other evidence regarding the adverse secondary effects of sexually oriented businesses. Despite the plethora of evidence that the City relied upon, the Seventh Circuit concluded that the City failed to adequately support its regulations because it did not rely upon evidence of adverse secondary effects caused by the *specific type* of sexually oriented business that Respondent, New Albany DVD ("DVD"), desired to operate. In essence, the Seventh Circuit mandated that when adopting zoning regulations, local governments must find and

rely upon evidence of adverse secondary effects caused by each and every conceivable type of sexually oriented business; and if a local government fails to introduce evidence of adverse secondary effects of any specific type of sexually oriented business, the local government cannot regulate, through its zoning power, that specific type of sexually oriented business. The Seventh Circuit's holding significantly impedes the exercise of reasonable legislative predictive judgment and local governments' efforts and ability to balance the needs of providing ample area for sexually oriented businesses to locate on the one hand and for protecting citizens from secondary effects on the other hand. Additionally, the holding undermines and conflicts with precedent established by this Court.

These effects impact municipalities nationwide, and therefore, *amicus curiae*, the International Municipal Lawyers Association, requests leave to appear. The following brief is filed in support of the City's plea to this Court to accept jurisdiction over this case.

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BACKGROUND AND SUMMARY OF THE ARGUMENT

This case involves the constitutionality of two traditionally-designed *zoning* ordinances (hereinafter collectively referred to as "ordinance") adopted by Petitioner, the City of New Albany ("City"), as applied to an adult bookstore ("DVD"). Like most traditionally-designed zoning schemes utilized around the country, the City has chosen to permit particular land uses by zoning category. The ordinance at issue here provides that sexually oriented businesses, as a category of commercial business, are a permitted use in several zoning categories including: C-2 (General Business), C-3 (Regional Shopping Center), I-1a (Light Industrial), I-1b (Light Industrial Park), and I-2 (Heavy Industrial). The ordinance further provides that a sexually oriented business must not be located 1,000 feet from any house of worship, day care center, public or private elementary or secondary school, residential district, and any other sexually oriented business. The ordinance also prohibits a sexually oriented business from locating within 500 feet of any dwelling.

The City recognized that the known adverse secondary effects of sexually oriented businesses include "crime, blight, litter, and the downgrading of property values." The City sought to combat these negative secondary effects and to "preserve the quality

of life and the urban setting . . . and character of surrounding neighborhoods" in its community, by adopting zoning regulations that govern where sexually oriented businesses may operate. In passing its zoning regulations, the City relied upon numerous studies, reports, and materials detailing the negative secondary effects of sexually oriented businesses. The City also relied upon numerous judicial decisions upholding regulations pertaining to sexually oriented businesses, including decisions rendered by this Court. Specifically, the City relied upon this Court's decisions in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) for the important *zoning* proposition that local governments have a substantial interest in regulating the location of sexually oriented businesses.

The City denied DVD's zoning permit application to operate a sexually oriented business for the sole reason that its location does not comply with the ordinance because it is within: (1) 175 feet of a church, (2) 115 feet of a residential district, and (3) adjacent to a dwelling. In an effort to circumvent the City's zoning regulations, DVD challenged the ordinance and sought a preliminary injunction. DVD claimed the ordinance violated its First Amendment rights because the ordinance is based on the books' and videos' content or subject matter and because the City did not justify that it had a substantial government interest in regulating adult bookstores that do not have peep show booths. Importantly, DVD did *not* contend that the City's zoning scheme infringes upon its First Amendment rights because it offers an insufficient number of available sites to operate. To the contrary, as noted by the Seventh Circuit in its decision, DVD did not challenge the City's contention that "more land

is available for adult establishments than is put off limits by this ordinance." *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 559 (7th Cir. 2009).

The district court held an evidentiary hearing and found that the City's evidence identified adverse secondary effects and demonstrated that the City had a substantial government interest in remedying those secondary effects. The district court also found that the studies the City relied upon in enacting the ordinance are relevant to the regulation of secondary effects, including crime. Further, the district court found that DVD's evidence did not, under the shifting burden test set forth in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality opinion), cast "direct doubt" on the City's rationale for the ordinance. Nevertheless, the district court granted the injunction, finding that the ordinance was not narrowly tailored to prevent the harms identified in the City's evidence. The district court concluded that the ordinance was not narrowly tailored because: (1) the ordinance broadly restricts adult businesses from locating near dwellings, but not specifically occupied dwellings; and (2) rather than imposing distance requirements from houses of worship, the ordinance could restrict the adult businesses' hours of operation to exclude Sundays or times when the houses of worship are in service.

DVD appealed the district court's decision to the Seventh Circuit. The Seventh Circuit started its analysis by essentially rejecting the district court's narrowly tailored rationale, opining that the narrowly tailored standard "does not mean that the ordinance must be the least restrictive possible regulation." *New Albany*, 581 F.3d at 559. The Seventh Circuit also

indicated that "[w]hen some regulation is justified, a city has considerable discretion on matters of detail. The sort of zoning rule that New Albany enacted has been too widely used, and too often sustained, to be upset as 'not narrowly tailored.'" *Id.* at 559. Despite those conclusions, the Seventh Circuit upheld the injunction and prevented the City from enforcing the location requirement in the ordinance.

Relying on and incorporating its recent decision in *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460 (7th Cir. 2009), the Seventh Circuit found that the City had not introduced any evidence demonstrating that adult book stores without peepshow booths cause adverse secondary effects. *Annex Books* holds that under intermediate scrutiny, "to prevail, the City needs evidence that the restrictions actually have a public benefit great enough to justify any curtailment of speech." *Id.* at 462. In order to reach this conclusion, the Seventh Circuit ignored all of the evidence that the City reasonably relied upon in adopting the ordinance, including evidence that sexually oriented businesses, as a category of commercial business, cause "crime, blight, litter, and the downgrading of property values."

The Seventh Circuit's heightened evidentiary standard conflicts with the "reasonably believed to be relevant" standard announced in *Renton* and reiterated in *Alameda Books*. Additionally, this heightened evidentiary standard -- coupled with the court's acknowledgment that New Albany has "more land . . . available for adult establishments than is put off limits by this ordinance" -- impedes the implementation of traditional zoning ordinances

regulating sexually oriented businesses, such as those upheld by this Court in *Young* and *Renton*.

The City of New Albany's petition should be granted for three independent reasons. First, the Seventh Circuit added an interpretive heightened evidentiary burden to the "reasonably believed to be relevant" standard used to justify sexually oriented business zoning ordinances. It held that in order for a city "to prevail, the city needs evidence that the restrictions actually have a public benefit great enough to justify any curtailment of speech." *See New Albany*, 581 F.3d at 560 (citing *Annex Books*, 581 F.3d 460). This holding is contrary to *Renton* and its progeny. Second, by increasing the evidentiary burden, the Seventh Circuit's decision requires citizens to suffer secondary effects of sexually oriented businesses before a legislative body can take action to ameliorate such effects. This defies common sense, reason, and this Court's precedent. It also threatens cities' long-established use of traditional "Euclidean-style" zoning regulations as a means of preventing the adverse secondary effects of sexually oriented businesses by dispersing those businesses away from houses of worship, parks, schools, residences, and other sexually oriented businesses. *See Village of Euclid v Ambler Realty Co.*, 272 U.S. 365 (1926) (decision of this Court upholding the early zoning concept of separating incompatible land uses; this type of zoning thereafter became known as "Euclidean-style" zoning). Third, the Seventh Circuit's decision diverges from this Court's precedents and exacerbates the split amongst the circuit courts of appeal over the requirements of *Alameda*.

ARGUMENT

I. THE SEVENTH CIRCUIT'S RULING MISTAKENLY INCREASED THE EVIDENTIARY BURDEN THAT GOVERNMENTS MUST SATISFY WHEN ENACTING SEXUALLY ORIENTED BUSINESS ZONING REGULATIONS SO THAT THOSE REGULATIONS DO NOT INFRINGE UPON RIGHTS PROTECTED BY THE FIRST AMENDMENT.

While a municipality cannot use a zoning regulation as a pretext to ban or suppress speech, the Court has recognized that a municipality's use of its zoning power "to preserve the quality of urban life is one that must be accorded high respect." *See Renton*, 475 U.S. at 50 (quoting *Young*, 427 U.S. at 71). In this context, the Court has analyzed zoning ordinances regulating the location of sexually oriented businesses as a time, place, and manner regulation. *Id.* at 46. This Court has applied intermediate scrutiny and has upheld "content neutral" zoning ordinances that are aimed at the secondary effects of such businesses, when it is demonstrated that the ordinances serve a substantial government interest and allow for reasonable alternative avenues of communication. *Renton*, 475 U S. at 47.

In *Renton*, this Court reversed the Ninth Circuit and declared valid a zoning ordinance that prohibited an adult motion picture theater from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park, or school. The Ninth Circuit had invalidated the zoning ordinance because the city failed to produce empirical evidence

specifically relating to "the particular problems or needs of Renton." *Id.* at 50. This Court found that the Ninth Circuit "imposed on the city an unnecessarily rigid burden of proof," and concluded that the city's reliance upon only a single opinion of the state supreme court in which the related experiences of the city of Seattle with adult theaters was thoroughly discussed was sufficient to demonstrate Renton's substantial government interest in regulating adult theaters. *Id.* at 50-51.

This Court held:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id. at 51-52.

After *Renton*, this Court has on several occasions refused to impose a stringent evidentiary burden on cities attempting to mitigate against the secondary effects of sexually oriented businesses, and has maintained that a city "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between the speech and a substantial, independent government interest." *See Alameda Books*, 535 U.S. at 439 (reliance on one 1977 study by city's planning department); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (reliance on two Supreme Court cases and over a century of city council findings); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560

(1991) (no legislative record, but reliance on judicial opinions during litigation).

Furthermore, in *Alameda Books*, the plurality opinion, authored by Justice O'Connor, clearly rejected the argument made by the dissent that empirical evidence was required in order to demonstrate that the government had a substantial governmental interest in regulating a particular form of adult entertainment. *Alameda Books*, 535 U.S. at 438-42. Also, the Court rejected the notion that the government must prove that its theory about the evidence of secondary effects is the only plausible explanation for the evidence. *Id.* In his concurring opinion, Justice Kennedy also refused to require a municipality to present empirical evidence to support its regulation. Although Justice Kennedy emphasized that "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion," *Id.* at 449 (Kennedy, J. concurring), he also stated that the Court has consistently opined that "a city must have latitude to experiment, at least at the outset, and that very little evidence is required." *Id.* at 451 (Kennedy, J., concurring) (citing *Renton*, 475 U.S. at 51-52). In addition, Justice Kennedy concluded "[a]s a general matter, courts should not be in the business of second-guessing fact bound empirical assessments of city planners," and that cities are "entitled to rely on that knowledge" and reasonable inferences from that knowledge in adopting adult entertainment regulations. *Id.* at 451-52 (Kennedy, J., concurring).

While the Court in *Alameda Books* outlined a burden-shifting *procedural* framework for analyzing whether *Renton's* minimal burden is met, and stated that a legislative body cannot rely on "shoddy data or

reasoning," the Court did not increase the "reasonably believed to be relevant" evidentiary standard enunciated in *Renton*.

Even though this Court has consistently upheld the "reasonably believed to be relevant" evidentiary standard enunciated in *Renton*, the Seventh Circuit found in this case that the City's extensive record of adverse secondary effects of sexually oriented businesses was not sufficient to sustain the constitutionality of the City's zoning ordinance that mandated that a sexually oriented adult bookstore be separated from houses of worship, parks, schools, residences, and other sexually oriented businesses. In fact, the Seventh Circuit did not even mention the "reasonably believed to be relevant" standard in its decision in this case, and imposed an additional evidentiary burden that requires the City to produce evidence that its zoning ordinance "actually" has "a public benefit great enough to justify any curtailment of speech." In essence, the Seventh Circuit is asking the City to demonstrate with certainty the exact outcome and consequences the zoning ordinance will have; that task is virtually impossible in the legislative arena, especially during the process of enacting a new law. This heightened evidentiary burden has no judicial anchor in any of the Court's precedents, and threatens to dramatically misdirect future secondary-effects cases away from the procedural and substantive requirements set forth in *Renton* and *Alameda Books*. Accordingly, the Seventh Circuit's decision should be reviewed and reversed.

II. THE SEVENTH CIRCUIT CAST ASIDE THE FUNDAMENTAL PRINCIPLE THAT LEGISLATIVE BODIES CAN ACT BASED ON REASONABLE PREDICTIVE LEGISLATIVE JUDGMENTS. AS A RESULT, THE SEVENTH CIRCUIT'S DECISION CAUSES CITIZENS TO SUFFER THE SECONDARY EFFECTS OF SEXUALLY ORIENTED BUSINESSES BEFORE LEGISLATIVE BODIES CAN TAKE ACTION TO AMELIORATE THOSE EFFECTS THROUGH THE USE OF ZONING.

The Seventh Circuit's decision threatens one of the most essential and critical tools that cities have to mitigate against the secondary effects of sexually oriented businesses: the ability, through their police power, to enact local zoning ordinances that regulate the *location* of sexually oriented businesses, before the public is forced to suffer the harm of those secondary effects.

When ruling that municipal police power justifies the enactment of zoning ordinances, courts have pointed to the need to prevent congestion, to secure quiet residential districts, and to procure an orderly segregation of industrial, commercial, and dwelling areas brought about by the constantly increasing density of urban populations, the multiplying forms of industry, and the growing complexities of civilization. 1 Rathkopf's The Law of Zoning and Planning § 1:2 (4th ed.). As early as 1926 in *Village of Euclid v. Ambler Realty Co.*, this Court recognized, as a valid exercise of municipal police power, a municipality's right to adopt a zoning ordinance classifying general land uses in a particular area in specific enumerated zoning categories. *Euclid*, 272 U.S. 365 (1926). In *Euclid*,

this Court found that the village had "substantial" and "sufficient" justifications for adoption of the zoning ordinance, including:

> promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops and factories.

Id. at 391-93.

Over the years, this basic zoning principle of prescribing by ordinance definite zoning district categories (such as residential, commercial, and industrial), and classes and subclasses of land uses allowed within such categories – which was upheld by this Court in *Euclid* -- became known as "Euclidean Zoning." *See, e.g.*, 1 Rathkopf's The Law of Zoning and Planning § 10:2 (4th ed.). Euclidean Zoning is a very prominent and indispensable planning tool that is used throughout the country, including in the City of New Albany, to establish an appropriate place for all kinds of uses.

In Village of Belle Terre v. Borras, this Court reaffirmed the validity of Euclidean Zoning, stating: "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay

out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Borras*, 416 U.S. 1 (1974). Further, this Court opined that "[a] zoning ordinance usually has an impact on the value of property which it regulates. *Id.* at 9.

Over the past 40 years or so, municipalities have extensively relied on the principles of Euclidean Zoning to pro-actively regulate the location of sexually oriented businesses in order to combat by preemptive strike the secondary effects of such businesses on the community. This effort has generated an extraordinary amount of litigation in state and federal courts. Indeed, this Court has on several occasions addressed the location of sexually oriented businesses in the context of municipal zoning powers. With the exception of *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which involved a city's failure to justify a *total ban* on live entertainment, this Court has consistently upheld cities' exercise of their zoning power to assign sexually oriented businesses to certain areas.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), two adult motion picture theaters brought an action challenging a zoning ordinance adopted by the City of Detroit that applied to theaters that presented materials emphasizing specified sexual activities and anatomical areas. The zoning ordinance prohibited such theaters from locating within 1,000 feet of certain regulated uses and 500 feet from residential areas. Recognizing "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems" and that "the city's interest in attempting to preserve the

quality of urban life is one that must be accorded high respect," this Court held that the City "may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71.

The Court reviewed another zoning ordinance that imposed locational requirements on adult motion picture theaters in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult theaters from locating within 1,000 feet of any residential zone, park, or school. While *Renton* is often cited for the "reasonably believed to be relevant" evidentiary standard regarding secondary effects, *Renton* is also an example of the legislative deference that the Court has given to cities to make difficult zoning decisions regarding the "admittedly serious problems" occasioned by the location of sexually oriented businesses when there are "reasonable alternative avenues of communication." *Id.* at 53-55 ("It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same area . . . .").

Lastly in *City of Los Angeles v. Alameda Books, Inc.*, an adult bookstore/video arcade challenged a zoning ordinance that required adult entertainment establishments from being within 1,000 feet from other such establishments or within 500 feet of religious institutions, schools, or public parks. After the city closed a loophole that allowed multiple businesses to operate under one roof, the ordinance also had the effect of forbidding the combination of more than one adult use from being located in a single building. Consequently, the adult businesses were required to

split the two kinds of businesses and operate them at different locations. Again, this Court deferred to the city's local zoning judgment and upheld the dispersal requirement. *Alameda Books*, 535 U.S. at 440 (acknowledging "that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on a local problem").

This Court has repeatedly recognized the importance of local zoning power to preserve the quality of life. And, this Court has preserved the "essence" of this power in cases where a city has attempted to ameliorate the secondary effects of sexually oriented businesses by pro-actively "[making] some areas available for [sexually oriented businesses] and their patrons, while at the same time preserving the quality of life in the community at large by preventing the businesses from operating in other areas." *See City of Renton*, 475 U.S. at 54. The Court has also looked favorably upon a city's substantial interest in choosing between two zoning strategies for the location of sexually oriented businesses; the Court has opined that the city can either "concentrate businesses for a concentrated regulatory strategy, or disperse them in order to spread out its regulatory efforts." *See Alameda Books*, 535 U.S. at 465 (Souter, J., dissenting) (recognizing that the Court held in *Renton* and *Young* that municipalities can concentrate adult entertainment businesses or disperse them).

Here, the Seventh Circuit, faced with reviewing a zoning ordinance that is "widely used" and "often sustained," found that the City's evidence of secondary effects failed to justify the use of traditional zoning principles to require that retail-only sexually oriented businesses be located away from houses of worship,

schools, parks, and residences. The Seventh Circuit commented negatively about the City's evidence regarding "litter" and "theft," but did not address in any fashion whatsoever the City's other evidence that justifies the zoning location restrictions imposed as a means of preserving "the quality of life and the urban setting; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight." For example, the Seventh Circuit disregarded the testimony of reknown secondary effects expert Dr. Richard McCleary, who testified that the data imported into the ordinance established an adequate factual predicate for the law.[2] (Petitioner's Brief, App. B, p.23a). And, the Seventh Circuit discounted the City's reliance upon *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004). *World Wide Video* also involved the zoning of a retail-only adult store. In *World Wide Video*, the Ninth Circuit found that the city, through testimonial evidence, demonstrated that retail-only sexually oriented stores had negative "economic and aesthetic impacts upon neighboring properties and the community as a whole." *Id.* at 1197-98. The City's reliance upon Dr. McCleary's testimony and *World*

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[2] After the hearing in the district court and prior to Seventh Circuit's decision, Dr McCleary published two articles corroborating the criminological theoretical expectation that off-site/retail sexually oriented businesses generate the same crime-related secondary effects expected for on-site sexually oriented businesses Richard McCleary, *Crime Related Secondary Effects, Secondary Effects of "Off-Site" Sexually Oriented Businesses* (June 2008) (printed as Part II of Report of the Texas City Attorneys Ass'n), Richard McCleary and Alan C Weinstein, *Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 Law & Policy No 2 (Apr 2009)

Wide Video should have provided a sufficient basis for the Seventh Circuit to rule in favor of the City in this case. *See Alameda Books*, 535 U.S. at 465 (Souter, J., dissenting) ("The limitations on location required no further support than the factual basis tying location to secondary effects."). The Seventh Circuit should have considered "all" of the evidence the City relied upon to adopt the ordinance, including the City's reliance upon Dr. McCleary's testimony and *World Wide Video*. Further, rather than substitute its judgment for that of the City's legislative body, the Seventh Circuit should have given the City's "inferences" and findings regarding this evidence more deference because of the City's right to pro-actively exercise its legislative judgment to address secondary effects by use of its zoning power.

This Court has long recognized the power of legislative bodies to base regulatory decisions on predictive judgments. "A fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997). This principle is even more applicable in the context of a time, place, and manner zoning regulation because content neutral regulations "do not impose the same 'inherent dangers to free expression' that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Id.* at 213 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994)).

Not surprisingly, when the Seventh Circuit cast aside this fundamental principle, it prevented the City

from making predictive legislative judgments on the basis of reasonably relevant evidence of secondary effects. This holding puts cities in a "catch-22"; if the sex industry creates a new subclass of sexually oriented business, cities will not have any actual evidence upon which to rely to regulate the new subclass because the evidence is non-existent until that subclass operates. Under the Seventh Circuit's reasoning, a city will have to wait for the secondary effects to occur before it can attempt to classify the use, like it does for other sexually oriented businesses in its zoning scheme. By then, the secondary effects will have already adversely affected the city and its citizens. The Seventh Circuit would have the city and its citizens first suffer the secondary effects, and thereafter attempt to regulate the business and reverse the secondary effects.

The practical land-planning problem with this rigid rule, from a zoning perspective, is that a city will have to suffer an avoidable harm and then either permanently live with the harm, or force the sexually oriented business to relocate to another location in order to prevent the harm from occurring. Of course, the latter approach would create many additional complicated legal issues that could expose a city to tremendous liability Many cities do not have the resources to engage such a battle, and therefore, would be forced to endure the secondary effects rather than face the legal consequences of trying to ameliorate them. This judicially created "catch-22" can be avoided if the city's ability to make predictive legislative zoning judgments is not saddled with a rigid evidentiary rule like the one imposed by the Seventh Circuit. There is no basis in law, reason, or common sense for this illogical rule.

Many cities across the country – like the City of New Albany in this case – have, throughout the years, exercised reasonable legislative judgment and employed Euclidian Zoning principles to adopt *Renton* and *Young*-type locational standards for sexually oriented businesses as a class of commercial use. *See, e.g.*, Municode.com (containing electronic copies of hundreds of city and county zoning codes across the United States). Many of these cities have diligently relied on the deferential "reasonably believed to be relevant" evidentiary standard in good faith to locate sexually oriented businesses within their respective communities.

If it is not reversed, the Seventh Circuit's decision will erode, if not destroy, this Court's long history of respecting local governments' predictive legislative judgment to find solutions to difficult problems. This Court should overturn the Seventh Circuit's ruling and reiterate the long-standing principle that local governments may pro-actively exercise their legislative judgment to address the secondary effects of sexually oriented businesses by using their zoning power to require that sexually oriented businesses be located in specific areas.

III. THE SEVENTH CIRCUIT'S DECISION EXACERBATES A GROWING CONFLICT IN THE CIRCUIT COURTS OF APPEAL REGARDING THE INTERPRETATION OF THIS COURT'S DECISION IN CITY OF LOS ANGELES V. ALAMEDA BOOKS.

Admittedly, the Seventh Circuit has recognized that "appellate decisions have struggled to understand and apply *Alameda Books*." *See Annex Books*, 581 F.3d

at 466. This struggle has caused conflict at the circuit court level, especially with respect to applying the *Renton* evidentiary standard to the regulation of "specific kinds" of sexually oriented businesses, like adult retail bookstores. This conflict supports the City's request that the Court hear this case.

In an approach similar to the one used by the Seventh Circuit in this case, the Fifth Circuit placed an increased burden on the city of San Antonio in *Encore Videos v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003). In *Encore*, a sexually oriented retail video store challenged the city's zoning provision that prohibited sexually oriented businesses from operating within 1,000 feet of residential areas, churches, schools, and parks. The Fifth Circuit struck down the ordinance on the basis that the city did not produce "some substantial evidence of the secondary effects of establishments that sell products solely for off-site consumption." *Id.* at 295. Interestingly, the Fifth Circuit reached a contrary conclusion several years later on a similar zoning ordinance in *H and A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007) (finding it was reasonable for the city to rely on real estate appraiser surveys to predict that the presence of an adult bookstore would negatively affect real estate value in surrounding area), *cert. denied*, 552 U.S. 825 (2007).

On the other hand, other circuit courts have more faithfully applied the "reasonably believed to be relevant" evidentiary standard under *Renton* and *Alameda Books*. For example, in *Richland Bookmart, Inc. v. Knox County*, 555 F 3d 512 (6th Cir. 2009), the Sixth Circuit upheld a county's sexually oriented

business regulations against an attack made by two sexually oriented businesses that sell and rent books, magazines, and videos to adults for "off-site consumption" or "retail only." Interpreting *Alameda Books*, the Sixth Circuit stated that "[r]equiring local governments to produce evidence of secondary effects for all categories created by every articulable distinction is a misapprehension of the Supreme Court's holding that governments may rely on any evidence 'reasonably believed to be relevant.'" *Id.* at 526. In addition, in another sexually oriented business "retail" case, the Ninth Circuit upheld a zoning ordinance similar to the one struck down by the Seventh Circuit in this case. *See World Wide Video*, 368 F.3d at 1195 ("The citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the 'very little' evidence standard of *Alameda Books*."). The Eleventh Circuit has also upheld a sexually oriented business zoning ordinance and public nudity ordinance from evidentiary attack in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (2007), *cert. denied*, 128 S. Ct. 1246 (2008). In that case, the Eleventh Circuit expressly rejected the claim that *Alameda Books* "raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies." *Id.* at 880; *see also Flanigan's Enterprises, Inc. v. Fulton County*, No. 08-17035, 2010 WL 520542 (11th Cir. Feb. 16, 2010).

These conflicts necessitate that the Court clarify the evidentiary standard required by *Renton* and *Alameda Books*.

CONCLUSION

For the foregoing reasons, the Court should grant the City's Petition for Writ of Certiorari.

Respectfully submitted,

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March 22, 2010